

No. 12452

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United States  
Court of Appeals  
for the Ninth Circuit.

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SAM GAILBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COM-  
PANY and SUN INSURANCE OFFICE,  
LIMITED,

Appellee.

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Transcript of Record

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Appeal from the United States District Court,  
Northern District of California,  
Northern Division.

**FILED**

APR -5 1950

**PAUL P. O'BRIEN,**  
CLERK



No. 12452

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Court of Appeals  
for the Ninth Circuit.

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THE HOMESTEAD FIRE INSURANCE COM-  
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# INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

|  | PAGE   |
|--|--------|
| Amendment to Complaint.....  | 11     |
| Answer to Complaint.....   | 9      |
| Appeal:  |        |
| Certificate of Clerk to Record on.....   | 169    |
| Designation of Portions of Record, Proceedings and Evidence to Be Contained in the Record on.....        | 22     |
| Notice of.....   | 21     |
| Order Extending Time to Prepare Record on.....   | 23, 24 |
| Statement of Points on.....  | 22     |
| Statement of Points and Designation of Record on.....  | 171    |
| Certificate of Clerk to Record on Appeal.....  | 169    |
| Complaint .....  | 2      |
| Designation of Portions of Record, Proceedings and Evidence to Be Contained in the Record on Appeal..... | 22     |
| Judgment .....   | 20     |

|   | INDEX | PAGE             |
|---|-------|------------------|
| Names and Addresses of Attorneys.....                           |       | 1                |
| Notice of Appeal.....   |       | 21               |
| Order Extending Time to Prepare Record on<br>Appeal .....       |       | 23, 24           |
| Proposed Findings of Fact and Conclusions of<br>Law .....       |       | 14               |
| Conclusions of Law.....   |       | 18               |
| Findings of Fact.....   |       | 14               |
| Reporter's Transcript.....                                      |       | 25               |
| Statement of Points on Appeal.....                              |       | 22               |
| Statement of Points and Designation of Record<br>on Appeal..... |       | 171              |
| Witnesses, Defendants':   |       |                  |
| Galbreath, Sam  |       |                  |
| —direct .....   |       | 89, 143, 167     |
| —cross .....  |       | 79, 99, 147, 167 |
| Gregory, Harry L.   |       |                  |
| —direct .....   |       | 129              |
| —cross .....  |       | 136              |
| Lemos, Cerino   |       |                  |
| —direct .....   |       | 103              |
| —cross .....  |       | 113              |
| —redirect .....   |       | 118              |
| Wold, Lars  |       |                  |
| —direct .....   |       | 120              |
| —cross .....  |       | 124              |

INDEX

PAGE

Witnesses, Plaintiffs':

Albers, Roy

|                 |    |
|-----------------|----|
| —direct .....   | 26 |
| —cross .....    | 29 |
| —redirect ..... | 33 |
| —recross .....  | 33 |

Little, Charles W.

|                 |             |
|-----------------|-------------|
| —direct .....   | 35, 162     |
| —cross .....    | 53, 163     |
| —redirect ..... | 58, 62, 163 |
| —recross .....  | 61, 63, 164 |

Little, Jack E.

|                 |    |
|-----------------|----|
| —direct .....   | 63 |
| —cross .....    | 68 |
| —redirect ..... | 77 |
| —recross .....  | 79 |

O'Malley, John L.

|               |     |
|---------------|-----|
| —direct ..... | 149 |
| —cross .....  | 152 |





## NAMES AND ADDRESSES OF ATTORNEYS

COOLEY, CROWLEY & GAITHER,

LOUIS V. CROWLEY,

H. ROWAN GAITHER, JR.,

ARTHUR E. COOLEY,

AUGUST CASTRO,

333 Montgomery St.,

San Francisco, Calif.,

Attorneys for Plaintiff

Sun Insurance Office, Limited.

EARL D. DESMOND,

E. VAYNE MILLER,

K. D. ROBINSON,

311 Capital National Bank Bldg.,

Sacramento, Calif.,

Attorneys for Defendant Sam Gailbreath.

In the District Court of the United States for the  
Northern District of California, Northern Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COM-  
PANY and SUN INSURANCE OFFICE,  
LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH,  
FIRST DOE, SECOND DOE, THIRD DOE,  
and BLACK COMPANY,

Defendants.

## COMPLAINT

First Cause of Action

(The Homestead Fire Insurance Company)

Plaintiff, The Homestead Fire Insurance Com-  
pany, complains of defendants and for cause of  
action alleges:

### I.

That plaintiff, The Homestead Fire Insurance  
Company, is now, and was at all times herein men-  
tioned, a corporation organized and existing under  
the laws of the State of Maryland and a citizen and  
resident of the State of Maryland, and is now, and  
was at all times herein mentioned, licensed by the  
State of California to do, and doing, the business  
of fire insurance in the State of California.

## II.

That all of the individual defendants and Black Company, a corporation, are citizens and residents of the State of California and that Signal Oil Company is a corporation and a citizen and resident of the State of California.

## III.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000) and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

## IV.

That on or about October 21, 1946, plaintiff issued its fire insurance policy No. 3432 to Herold Lumber Company whereby plaintiff insured it in the sum of \$5,000 against loss and damage by fire to its lumber storage and office building in Auburn, California; that on October 31, 1946, the said building, which was of a value in excess of \$5,000, was destroyed by fire, and the said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff became obligated to pay, and on or about January 31, 1947, did pay to said Herold Lumber Company the sum of \$5,000 because of said fire damage sustained by it; and that by reason of such payment plaintiff, The Home-

stead Fire Insurance Company, became subrogated to the rights of said Herold Lumber Company against defendants herein who negligently caused the said fire as hereinafter stated.

#### V.

That on October 31, 1946, defendants First Doe and Second Doe, who were then acting in the course of their employment as the employees of the other defendants, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building.

#### VI.

That by reason of the premises, plaintiff, The Homestead Fire Insurance Company, has been damaged in the sum of \$5,000, no part of which damages has been paid.

#### VII.

That the names of the defendants sued herein as First Doe, Second Doe and Black Company are fictitious and plaintiff will ask leave to insert the real names of said defendants herein when same shall have been ascertained.

Second Cause of Action

(Sun Insurance Office, Limited)

Plaintiff, Sun Insurance Office, Limited, complains of defendants and for cause of action alleges:

I.

That plaintiff, Sun Insurance Office, Limited, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of England and a citizen and resident of England, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing, the business of fire insurance in the State of California.

II.

That all of the individual defendants and Black Company, a corporation, are citizens and residents of the State of California and that Signal Oil Company is a corporation and a citizen and resident of the State of California.

III.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000) and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

## IV.

That on or about October 1, 1946, plaintiff issued its fire insurance policy No. 569021 to Herold Lumber Company whereby plaintiff insured it in the sum of \$7,500 against loss and damage by fire to its lumber storage and office building in Auburn, California; that on October 31, 1946, the said building, which was of a value in excess of \$5,000, was destroyed by fire, and the said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff became obligated to pay, and on or about February 4, 1947, did pay to said Herold Lumber Company the sum of \$4,021.09 because of said fire damage sustained by it; and that by reason of such payment plaintiff, Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company against defendants herein who negligently caused the said fire as hereinafter stated.

## V.

That on October 31, 1946, defendants First Doe and Second Doe, who were then acting in the course of their employment as the employees of the other defendants, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in said building as to cause, and they did cause, a fire to start in said

building which fire resulted in the destruction of said building.

## VI.

That by reason of the premises, plaintiff, Sun Insurance Office, Limited, has been damaged in the sum of \$4,021.09, no part of which damages has been paid.

## VII.

That the names of the defendants sued herein as First Doe, Second Doe and Black Company are fictitious and plaintiff will ask leave to insert the real names of said defendants herein when same shall have been ascertained.

Wherefore, plaintiff, The Homestead Fire Insurance Company, prays judgment against defendants for the sum of Five Thousand Dollars (\$5,000), for interest thereon at the rate of seven per cent (7%) per annum from January 31, 1947, and for its costs of suit incurred herein; and plaintiff, Sun Insurance Office, Limited, prays judgment against defendants for the sum of Four Thousand and Twenty-one and 09/100 Dollars (\$4,021.09), for interest thereon at the rate of seven per cent (7%) per annum from February 4, 1947, and for its costs of suit incurred herein.

/s/ ARTHUR E. COOLEY,

/s/ LOUIS V. CROWLEY,

/s/ H. ROWAN GAITHER, JR.,

/s/ COOLEY, CROWLEY &

GAITHER,

Attorneys for Plaintiffs.

State of California,  
City and County of San Francisco—ss.

Arthur E. Cooley, being first duly sworn, deposes and says:

That he is a member of the law firm of Cooley, Crowley & Gaither, attorneys for plaintiffs, The Homestead Fire Insurance Company and Sun Insurance Office, Limited, and has his office in the City and County of San Francisco; that neither of said plaintiffs has an officer within the said City and County who can verify the within and foregoing Complaint, and for that reason affiant makes this verification for and on behalf of said plaintiffs. He has read said Complaint and knows the contents thereof; the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to such matters he believes it to be true.

/s/ ARTHUR E. COOLEY.

Subscribed and sworn to before me this 24th day of October, 1947.

[Seal] /s/ DOROTHY H. McLENNAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Oct. 25, 1947.



[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant Sam Galbreath and for his answer to the alleged cause of action of the Homestead Fire Insurance Company set forth in the complaint of plaintiffs on file in the above entitled action, admits, denies and alleges as follows:

I.

Answering Paragraphs I and IV of said alleged cause of action, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraphs I and IV of said alleged cause of action.

II.

Answering Paragraph V of said alleged cause of action, this answering defendant denies each and every, all and singular, the allegations contained in said Paragraph V.

III.

Answering Paragraph VI of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph VI.

As And For His Answer To The Alleged Cause

Of Action Of The Sun Insurance Office, Limited, Set Forth In Said Complaint, this answering defendant admits, denies and alleges as follows:

I.

Answering Paragraphs I and IV of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs.

II.

Answering Paragraph V of said alleged cause of action, this answering defendant denies each and every, all and singular, the allegations contained in said Paragraph V.

III.

Answering Paragraph VI of said alleged cause of action, this answering defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph VI.

Wherefore, this answering defendant prays that plaintiffs take nothing by reason of their said action, and further prays that said action may be dismissed with this answering defendant recovering his costs of suit incurred herein.

EARL D. DESMOND,  
E. VAYNE MILLER,  
K. D. ROBINSON,

Attorneys for Defendant  
Sam Gailbreath.

State of California,  
County of Sacramento—ss.

Sam Gailbreath, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the above and foregoing Answer To Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to such matters, he believes it to be true.

/s/ SAM GAILBREATH.

Subscribed and sworn to before me this 6th day of February, 1948.

[Seal] /s/ C. E. DUNLAP,  
Notary Public in and for the County of Sacramento,  
State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 6, 1948.

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[Title of District Court and Cause.]

### AMENDMENT TO COMPLAINT

Now comes the plaintiff Sun Insurance Office, Limited and by permission of the above-entitled Court first had files this, an Amendment to Paragraph IV of the Second Alleged Cause of Action

of said Complaint filed herein, by substituting the following, to be numbered Paragraph IV, to wit:

That on or about October 1, 1946, plaintiff Sun Insurance Office, Limited, issued its fire insurance policy numbered 569021 to Herold Lumber Company whereby said plaintiff insured Herold Lumber Company in the sum of \$7,500.00 against loss and damage by fire to its stock on its premises at its lumber storage and office building at Folsom Road near the Texas Oil Company spur, Auburn, California; that on October 31, 1946, said stock, which was of a value in excess of \$4,021.09, was destroyed by fire and said insurance policy was in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said insurance policy plaintiff Sun Insurance Office, Limited, became obligated to pay and on or about January 4, 1947, did pay to said Herold Lumber Company the sum of \$4,021.09 because of said fire damage sustained by it, and that by reason of such payment plaintiff Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company to the extent of \$4,021.09 against defendants herein, who negligently caused the said fire as hereinafter stated.

Dated: April 13, 1929.

COOLEY, CROWLEY &  
GAITHER,

By /s/ AUGUSTUS CASTRO,

Attorneys for plaintiff Sun  
Insurance Office, Limited.

State of California,

City and County of San Francisco—ss.

Augustus Castro, being sworn, deposes and says:

That he is an attorney at law duly licensed to practice in the courts of the State of California, a member of the firm of Cooley, Crowley & Gaither, attorneys for the plaintiff Sun Insurance Office, Limited, named in the above entitled action; that as such attorney he has and maintains his offices in the City and County of San Francisco, State of California; that said plaintiff resides out of and is absent from the said city and county; that for this reason he makes this verification for and on behalf of said plaintiff; that he has read the foregoing Amendment to Complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

/s/ AUGUSTUS CASTRO.

Subscribed and sworn to before me this 13th day of April, 1949.

[Seal] /s/ ANN J. EGGERS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Sept. 28, 1952.

Affidavit of service by mail attached.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly for trial on the 11th day of May, 1948, and the 18th day of April, 1949, and evidence both oral and documentary having been introduced, and said matter having been fully argued and submitted for the decision of the above entitled Court, after due deliberation the Court makes its

Findings of Fact

I.

It is true that at all times hereinafter mentioned:

(a) That plaintiff, The Homestead Fire Insurance Company, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of the State of Maryland and a citizen and resident of the State of Maryland, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing, the business of fire insurance in the State of California.

(b) That plaintiff Sun Insurance Office, Limited, is now, and was at all times herein mentioned, a corporation organized and existing under the laws of England and a citizen and resident of England, and is now, and was at all times herein mentioned, licensed by the State of California to do, and doing,

the business of fire insurance in the State of California.

(c) That Cerino Lemos and Harry Gregory were the agents, servants and employees of the defendant Sam Galbreath and were acting within the course of their employment as such.

(d) That the lumber storage and office building hereinafter mentioned was of a value in excess of \$5,000.00.

(e) That the destroyed part of the stock in trade of lumber hereinafter mentioned was of a value in excess of \$4,201.09.

## II.

It is true that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 and that jurisdiction of the action is founded upon diversity of citizenship and the amount in controversy.

## III.

It is true that on or about the 21st day of October, 1946, plaintiff The Homestead Fire Insurance Company issued its fire policy No. 3432 to Herold Lumber Company whereby plaintiff, the Homestead Fire Insurance Company, insured Herold Lumber Company in the sum of \$5,000.00 against loss and damage by fire to its lumber storage and office building in Auburn, California.

## IV.

It is true that on or about October 10, 1946, plaintiff Sun Insurance Office, Limited, issued its fire insurance policy No. 569021 to Herold Lumber Company whereby plaintiff Sun Insurance Office, Limited, insured Herold Lumber Company in the sum of \$7,500.00 against loss and damage by fire to its stock of lumber situate on the premises of Herold Lumber Company.

## V.

It is true that on October 31, 1946, said building and the following part of said stock, to wit:

|         |   |        | Loss and<br>Damage |               |
|---------|---|--------|--------------------|---------------|
| 412 Pc. | 1x12x16 #1 Com. PP S45 ....             | 6,592' | \$100.50           | \$ 662.50     |
| 1628    | 2x4x— .....                             | 17,363 | 71.75              | 1245.80       |
| 514     | 2x6x .....                              | 8,224  | 71.25              | 585.96        |
| 632     | 1x16x16 #1 Com PP<br>S45-V Rustic ..... | 8,426  | 96.00              | 808.90        |
| 542     | 1x4x V.G. D Select Fig. D.F.            | 2,890  | 106.75             | 308.50        |
| 184     | 2x8x16 #1 D.F. R.D. ....                | 3,925  | 69.25              | 271.81        |
| 35      | 2x12x16 .....                           | 1,120  | 70.50              | 78.96         |
| 26      | 4x6x16 .....                            | 832    | 70.50              | 58.66         |
|         |   |        |                    | <hr/> 4021.09 |

were destroyed by fire and each of the said insurance policies were in full force and effect at the time of said fire; that by reason of said fire and pursuant to the terms of said policies and that by reason of said policy No. 3432 plaintiff The Homestead Fire Insurance Company became obligated to pay and on or about the 31st day of January,



1947, did pay to said Herold Lumber Company the sum of \$5,000.00 because of said fire damage sustained by said Herold Lumber Company on account of such destruction of said building, and that by reason of such payment plaintiff The Homestead Fire Insurance Company became subrogated to the rights of said Herold Lumber Company to the extent of \$5,000.00 against said defendant herein who negligently caused said fire as hereinafter stated; and that by reason of said fire pursuant to the terms of said policy No. 569021 plaintiff Sun Insurance Office, Limited, became obligated to pay and on or about the 4th day of February, 1947, did pay to said Herold Lumber Company the sum of \$4,021.09 because of said fire damage sustained by Herold Lumber Company on account of such destruction of said stock and that by reason of such payment, said plaintiff Sun Insurance Office, Limited, became subrogated to the rights of said Herold Lumber Company to the extent of \$4,021.09 against said defendant herein who negligently caused said fire as hereinafter stated.

## VI.

It is true that on October 31, 1946, said Cerino Lemos and Harry Gregory who were then acting in the course of their employment as the employees of said defendant Sam Galbreath, so carelessly and negligently installed, controlled and tested a certain oil burning stove then under their sole control in

said building as to cause, and they did cause, a fire to start in said building which fire resulted in the destruction of said building and part of stock of lumber.

#### VII.

It is true that by reason of the premises, plaintiff, The Homestead Fire Insurance Company, has been damaged in the sum of \$5,000.00, no part of which damage has been paid.

#### VIII.

It is true that by reason of the premises, plaintiff, Sun Insurance Office, Ltd., has been damaged in the sum of \$4,021.09, no part of which damage has been paid.

From the above findings of fact, the Court makes its

#### Conclusions of Law

##### I.

That plaintiff, The Homestead Fire Insurance Company, is entitled to judgment against the defendant Sam Galbreath for the sum of \$5,000.00, together with interest thereon at the rate of 7% per annum from the 31st day of January, 1947, to and including the rendition of judgment herein.

##### II.

That the plaintiff, Sun Insurance Office, Ltd., is entitled to judgment against the defendant Sam

Galbreath for the sum of \$4,021.09, together with interest thereon at the rate of 7% per annum from the 4th day of February, 1947, to and including the rendition of judgment herein.

It Is Therefore Ordered, that a judgment be entered in favor of the plaintiff, The Homestead Fire Insurance Company, and against the defendant Sam Galbreath for \$5,000.00, together with interest thereon at the rate of 7% per annum from the 31st day of January, 1947, to and including the rendition of judgment herein, and in favor of the plaintiff, Sun Insurance Office, Ltd., and against the defendant Sam Galbreath for \$4,021.09, together with interest thereon at the rate of 7% per annum from the 4th day of February, 1947, to and including the rendition of judgment herein, together with their costs of suit herein.

Dated: May 4, 1949.

/s/ DAL M. LEMMON,

U. S. District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed April 27, 1949.

In the District Court of the United States for  
the Northern District of California, Northern  
Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COM-  
PANY and SUN INSURANCE OFFICE,  
LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH,  
FIRST DOE, SECOND DOE, THIRD DOE  
and BLACK COMPANY,

Defendants.

### JUDGMENT

The above cause having been tried and submitted  
and the Court having made, filed and caused to be  
entered herein its Findings of Fact and Conclusions  
of Law and ordered judgment in favor of plaintiffs,

Wherefore, by Reason of the Premises, It Is  
Ordered, Adjudged and Decreed:

1. That the plaintiff, the Homestead Fire Insur-  
ance Company, recover from the defendant Sam  
Galbreath the sum of \$5,787.50 damages, together  
with its costs of suit herein taxed at the sum of  
\$74.35.

2. That the plaintiff, Sun Insurance Office, Lim-  
ited, recover from the defendant Sam Galbreath the

sum of \$4,654.41 damages, together with its costs of suit herein taxed at the sum of \$122.54.

Dated: May 10th, 1949.

/s/ DAL M. LEMMON,  
U. S. District Judge.

Entered in Civil Docket May 10, 1949.

[Endorsed]: Filed May 10, 1949.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Sam Galbreath, Defendant in the above-entitled case, hereby appeals from the judgment entered herein on the 10th day of May, 1949.

Dated: October 24, 1949.

EARL D. DESMOND,  
E. VAYNE MILLER,  
K. D. ROBINSON,  
Attorneys for Defendant,  
Sam Galbreath.

[Endorsed]: Filed Oct. 24, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD,  
PROCEEDINGS AND EVIDENCE TO BE  
CONTAINED IN THE RECORD ON AP-  
PEAL

A. A transcription by the reporter of all the testimony taken at the trial which was stenographically reported.

B. A copy of the Complaint and Amended Complaint.

C. A copy of the Answer.

D. Findings of Fact and Conclusions of Law.

E. Notice of Motion for new trial.

F. Decision, Judgment and Opinion of Court.

Respectfully submitted,

/s/ EARL D. DESMOND,

/s/ E. VAYNE MILLER,

/s/ K. D. ROBINSON,

Attorneys for Defendant  
Sam Galbreath.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The Court committed error in finding that the fire was proximately caused by the stove.

2. The doctrine of Res Ipsa Loquitur cannot be applied to the instant cause.

3. Plaintiffs did not establish that the instrumentality complained of, the stove and its accessories were under the exclusive control of the defendants.

4. As a general rule the destruction of property by fire does not raise the presumption of negligence.

5. A stove is not an inherently dangerous article and the "Res Ipsa Loquitur" doctrine is not applicable.

Respectfully submitted,

/s/ EARL D. DESMOND,

/s/ E. VAYNE MILLER,

/s/ K. D. ROBINSON,

Attorneys for Defendant

Sam Galbreath.

[Endorsed]: Filed Dec. 1, 1949.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE  
RECORD ON APPEAL

Good cause appearing therefore, It Is Ordered that Defendant Sam Galbreath may have to and including the 31st day of December, 1949, in which to prepare record on appeal herein.

Dated: December 2, 1949.

/s/ DAL M. LEMMON,

Judge of the United States

District Court.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE  
RECORD ON APPEAL

Good cause appearing therefor, It Is Ordered that Defendant Sam Galbreath may have to and including the 16th day of January, 1950, in which to prepare record on appeal herein.

Dated: December 29th, 1949.

. /s/ DAL M. LEMMON,

Judge of the United States  
District Court.

[Endorsed]: Filed Dec. 28, 1949.



In the District Court of the United States for  
the Northern District of California, Northern  
Division

No. 5911

THE HOMESTEAD FIRE INSURANCE COM-  
PANY and SUN INSURANCE OFFICE,  
LIMITED,

Plaintiffs,

vs.

SIGNAL OIL COMPANY, SAM GALBREATH,  
FIRST DOE, SECOND DOE, THIRD DOE,  
and BLACK COMPANY,

Defendants.

Before: Hon. Dal M. Lemmon,  
Judge.

### REPORTER'S TRANSCRIPT

#### Appearances:

For the Plaintiffs:

AUGUSTUS CASTRO, ESQ.,  
COOLEY, CROWLEY & GAITHER,  
333 Montgomery Street,  
San Francisco 4, Calif.

For Defendant Sam Galbreath:

EARL D. DESMOND, ESQ.,  
E. VAYNE MILLER, ESQ.,  
K. D. ROBINSON, ESQ.,  
307-11 Capital National Bank Bldg.,  
Sacramento 14, Calif.

Tuesday, May 11, 1948—10:00 o'Clock A.M.

The Clerk: Homestead Fire Insurance Company versus Signal Oil Company.

Mr. Castro: Ready for the plaintiffs.

Mr. Desmond: Ready.

Mr. Castro: May I finish putting on this diagram, your Honor? It will be very short.

The Court: You may.

Mr. Castro: Call Mr. Roy Albers.

The Court: May I ask counsel for the plaintiffs what is the situation with relation to the Signal Oil Company?

Mr. Castro: The complaint against the Signal Oil Company has been dismissed without prejudice.

The Court: The form of the dismissal is that agreement?

The Clerk: It isn't signed by you, sir.

Mr. Castro: It is not signed; however, I will sign it.

### ROY ALBERS

Called by the plaintiffs, sworn.

The Clerk: May we have your name, sir?

A. Roy Albers.

#### Direct Examination

By Mr. Castro:

Q. What is your name? [2\*]

A. Roy Albers.

Q. Where do you live? A. Sonora.

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\* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Roy Albers.)

Q. How long have you lived there?

A. Forty years.

Q. What is your occupation? A. Laborer.

Q. In October of 1946, were you employed by Herold Lumber Company? A. Yes, sir.

Q. Where? A. Auburn.

Q. And at that time, who was your superior employee? A. Charley Little.

Q. And on the 31st day of October, 1946, were you acquainted with Sam Galbreath?

A. I didn't get that.

Mr. Castro: The witness is hard of hearing, your Honor. I am sorry; I will try to raise my voice.

Q. Were you acquainted with Sam Galbreath?

A. Yes, sir.

Q. And how long had you known Mr. Galbreath?

A. Oh, I would say about six months.

Q. Did you go to Mr. Galbreath's place of business on October 31, 1946, and pick up a stove? [3]

A. I did.

Q. Do you know what type of stove that was?

A. I couldn't say the name, but it is an oil stove.

Q. Who sent you for it?

A. Charley Little.

Q. And whom did you see at Galbreath's plant where you picked it up?

A. Just the son and the father.

Q. Do you know the son's name?

A. No, I don't.

(Testimony of Roy Albers.)

Q. Was that stove crated or uncrated?

A. I didn't get it.

Q. Was the stove crated?

The Court: Boxed in a crate or not?

The Witness: Yes, it was in a crate.

Q. (By Mr. Castro): What did you do with the stove?

A. Well, I put it on a pickup, took it over to the office and unloaded it.

Q. Whose office did you take it to?

A. To the plant office, Auburn.

Q. At the Herold Lumber Company?

A. Yes, sir.

Q. What did you do with the stove when you unloaded it?      A. Just left it sit there.

Q. Did you uncrate or unbox it? [4]

A. No, sir.

Q. Did you take the crate off?

A. Just the top of it to look at it.

Q. And where did you put the stove in the lumber yard?      A. In the office.

Q. Now (indicating) this rectangle represents the rectangular building of Herold Lumber Company in Auburn.

Mr. Desmond: Well, I object to that as a conclusion. There is no foundation laid.

Mr. Castro: All right, we will strike it then, counsel.

Q. Now, where in the office did you put the stove?      A. Well, right in by the counter.

(Testimony of Roy Albers.)

Q. Did you do anything else with the stove?

A. No, I didn't.

Q. Later that day, did you see anybody from Sam Galbreath's place of business at the lumber office?

A. No, sir.

Q. Did you see any truck with the Galbreath sign on it at the lumber company?

A. On the following day.

Q. What? A. On the following day.

Q. On the day after the delivery?

A. Yes, sir. [5]

Q. And will you describe the truck that you saw there?

A. I think I could.

Q. Go ahead.

The Court: Describe it.

The Witness: Just a pickup with the equipment to maintain the stove, and one thing and another.

Q. (By Mr. Castro): And did it have any name on it?

A. I think it did; the Signal Oil Company.

Q. Did it have any other name?

A. Sam Galbreath's name on it.

Q. Now did you do anything other than uncrate the top of that stove?

A. No, I did not.

Mr. Castro: You may cross-examine.

#### Cross-Examination

By Mr. Desmond:

Q. You state, Mr. Albers, that you got the stove in Mr. Galbreath's place of business?

A. I can't hear you.

(Testimony of Roy Albers.)

Q. You state that you got this stove, or this stove that was in a crate, at Mr. Galbreath's place of business?      A. I did.

Q. What day was that?

A. Well, I couldn't say the date.

Q. Do you remember what day of the week it was?      A. No. [6]

Q. Were you working for the Herold Lumber Company at the time?      A. Yes.

Q. What were your duties?

A. I was a leveller operator.

Q. The leveller operator. Would you explain that?

A. Well, it's a machine that picks up lumber.

Q. How long had you been working there?

A. Oh, just a short while.

Q. I see. Now, who sent you after this stove?

A. Charley Little.

Q. What did he tell you?

A. He says, "Go over and pick up the stove up and bring it over."

Q. Did he tell you what kind of stove?

A. An oil stove.

Q. Did he give you any other instructions?

A. That's all.

Q. And you are sure you went over in a pickup truck and got the stove?      A. It was my truck.

Q. Your own personal truck?      A. Yes.

Q. It didn't belong to the lumber company?

A. No. [7]

(Testimony of Roy Albers.)

Q. And where did you put the stove?

A. Inside the office behind the counter.

Q. Inside of the office of the lumber company behind the counter, is that correct? A. Yes.

Q. And did you do anything further with it?

A. No.

Q. And who delivered the stove to you?

A. Who delivered it to me?

Q. Yes.

A. Sam Galbreath.

Q. Did you have any conversation at that time about installing it or anything? A. No.

Q. Didn't talk about installing it?

A. Oh, I just asked him about it, just a few questions.

Q. What did you ask him?

A. What kind of stove it was and how good it was. I figured on getting one myself.

Q. You later bought a stove, did you?

A. Yes.

Q. Did you ask Mr. Galbreath how to install it, how to connect it up or anything? A. No, sir.

Q. Did you ask him how it burnt? [8]

A. No.

Q. Didn't you ask him how to light it or anything? A. No.

Q. You had no conversation at all other than Mr. Little sent you for a stove? A. No.

Q. Now, did you get any stove pipe with the stove? A. No, sir.

(Testimony of Roy Albers.)

Q. Did you get any connections for the stove?

A. No, sir; just the stove.

Q. Just the stove in a crate?

A. That's right.

Q. I see. Now, you say you saw a truck with the Signal Oil Company's sign and Mr. Galbreath's name on it the following day?

A. How was it?

Q. I say you said—you testified that you saw a truck with the Signal Oil Company's sign on it, and Mr. Galbreath's name on it, the following day, is that right?

A. Yes.

Q. Where did you see that truck?

A. I am pretty sure it was sitting out in front.

Q. In front of where? A. Of the office.

Q. What office? [9]

A. Herold Lumber Company.

Q. Now, would you tell us, please, where the Herold Lumber Company's office was?

A. Where it was located?

Q. Yes.

A. Outskirts of the Sacramento Highway.

Q. Well, what do you mean "the Sacramento Highway"?

A. Street.

Q. On Sacramento Street?

A. Yes, in Auburn.

Q. Is that the main highway between Sacramento and Auburn?

A. No.

Q. Tell the Court what highway.

A. Just the back road from here to Folsom.



(Testimony of Roy Albers.)

Q. And how far back is it from the—the building, how far is the building back from the highway?

A. Oh, I would say about fifty feet.

Q. And what sort of a building was it, wood or metal?      A. Wood.

Q. Now, with reference to the lumber company building you have described, where is Mr. Galbreath's plant?

A. Well, I would say that's about 150 yards away from there.

Q. In what direction?

A. That would be south.

Q. Now, that was the day after you got the stove, you are [10] positive of that?

A. No, I ain't positive of anything.

Mr. Desmond: I see. That's all.

#### Redirect Examination

By Mr. Castro:

Q. Did a fire take place at the lumber yard while the Galbreath truck was there?

Mr. Desmond: Objected to, your Honor, as assuming something not in evidence.

The Court: Overruled; you may answer.

The Witness: Yes.

Mr. Castro: No further questions.

The Court: Any further questions?

#### Recross-Examination

By Mr. Desmond:

Q. You are positive this truck you saw had the name "Galbreath" on it?      A. I was.

(Testimony of Roy Albers.)

Q. Where was it on the truck?

A. I am pretty sure it was on the door.

Q. What was the name? Was there any initials or anything?      A. No; it's hard to say.

Q. Do you know whether or not there was a name on it?      A. I am pretty sure there was.

Q. How sure are you?

A. I am pretty sure.

Q. You are sure there was no name on there except Signal [11] Oil Company?

A. Sam Galbreath's name.

Q. You are sure of that?      A. Yes.

Q. Now, you mention a fire. Did that fire occur the same day that you took the stove over?

A. No.

Q. You are sure of that?

A. I am sure of that.

The Court: Was it the next day?

A. That, I couldn't say.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Castro: Mr. Little.

### CHARLES W. LITTLE

Called for the plaintiffs, sworn.

The Clerk: And your full name, sir?

A. Charles W. Little.

The Clerk: Will you take the witness stand, please?

(Testimony of Charles W. Little.)

Direct Examination

By Mr. Castro:

Q. Will you state your name?

A. Charles W. Little.

Q. Where do you reside?

A. Forest Hill. [12]

Q. How long have you lived there?

A. Oh, off and on for about two and a half years.

Q. And in October of 1946, where were you living?      A. Auburn.

Q. That is in what county?

A. Placer County.

Q. And State of California?      A. Right.

Q. And at that time, in whose employment were you?      A. Herold Lumber Company.

Q. And where were you employed?

A. At the Herold Lumber Company, on Sacramento Street.

Q. In what city?      A. Auburn.

Q. And was that located in the city itself or is it outside the city?      A. On the outskirts.

Q. Now, what did the lumber company consist of so far as actual physical set-up at its place of business?

A. Well, it consisted of approximately two acres of ground, and was in the course of construction of a——

Q. It was a new plant there?      A. Right.

(Testimony of Charles W. Little.)

Q. Was a building erected? A. Yes. [13]

Q. What type of building was it?

A. Lumber shed. On that lumber shed was two rooms built into it.

Q. And do you know the approximate length of that building? A. 32 by 64, I believe.

Q. 32 feet would be what, the width?

A. That's right.

Q. And 64 feet would be the length?

A. That's right.

Q. Now where were these offices in that building?

A. In the southwest corner.

Q. Southwest. And can you give me the approximate size of the office?

A. 16 by 16 each, office and storeroom.

Q. Now, indicate on the blackboard here, if you will with the chalk, the location of the office in that building.

A. (Witness goes to blackboard and indicates.)

Q. You have marked "X,"—

A. That's right.

Q. (Continuing): —as the office. That would be the southwest corner? A. That's right.

Q. And where is the Sacramento Street that you have referred to? A. We will mark— [14]

Q. We will mark there "Sacramento." Now, what was that building constructed of?

A. Well, it is constructed of fir timbers and siding on the office part of it, and on the ends—

(Testimony of Charles W. Little.)

Q. Now, in that office, were there any windows?

A. Yes, there were four.

Q. Would you indicate the windows?

A. (Witness indicates.)

Q. Now, you have just put in two windows, I believe, on the front side of the building, and also two on——

A. On the west—or the south side.

Q. That would be the south side; and the front side is what direction?

A. West.

Mr. Desmond: May I suggest to the counsel, would he have the witness indicate the various directions: north, east, south and west?

Q. (By Mr. Castro): Now, did that office have any doors?

A. It had a door here and a door here. (Indicating.)

Q. Would you draw the doors in?

A. (The witness draws on blackboard.)

Q. Now did the office have anything in it besides the four walls and the floor and the ceiling?

A. The counter and two desks and a telephone.

Q. Where was the counter located? [15]

A. Well, this is a good illustration. (Indicating.)

Q. You have indicated a rectangle. Would you mark that as the counter?

A. (Witness makes mark on blackboard.)

Q. What is the approximate length of that counter?

A. Thirteen feet.

(Testimony of Charles W. Little.)

Q. And about how far was it set from the south side of the building?      A. About three feet.

Q. About how wide was the counter?

A. I think it was twenty-two inches wide.

Q. And its approximate height?

A. About forty inches.

Q. Now, where were the desks that you have referred to?

A. They were over on this side. (Indicating.)

Q. You have drawn two rectangles. Would you indicate the word "desks" on them?

A. (Witness indicates.)

Q. Now, are you acquainted with Sam Gailbreath?      A. Yes.

Q. How long have you known him?

A. About ten years.

Q. And during that time have you done any business with him?      A. Oil—stove—

Q. And during the month of October, 1946, did you have any conversation with him concerning a heating system or a heating unit for that office? [16]

A. I did.

Q. Where did that conversation take place?

A. In his office.

Q. Who was present?

A. Well, I don't remember if there was anybody present; probably some one of his employees may have been in and out.

Q. Whom did you talk to at that time?

A. Sam.

(Testimony of Charles W. Little.)

Q. What was your discussion?

Mr. Desmond: Will you fix the date?

Q. (By Mr. Castro): Can you fix that date with relation to when you had a fire at the lumber company?

A. Previous.

Q. About how long previous?

A. It may have been a week.

Q. And what was that conversation?

A. To see whether or not he could furnish me a stove.

Q. And was he able to furnish a stove?

A. He said he could, yes.

Q. And, did he give you any description or name of the stove?

A. Well, no, any more than we discussed the size of the stove necessary to heat the area that was to be heated.

Q. And what size of stove was it to be?

A. That I can't tell.

Q. Now was there any discussion concerning the installation [17] of the stove?

A. No more than he had the necessary tubing, pipe and fittings and would install it.

Q. Now, did you later have a stove picked up from Galbreath's?

A. Yes.

Q. Did you have the copy of the delivery tag, whatever it is, Mr. Little; did you have a sales tag, I believe Number B-42277—

Mr. Castro: At this time, we would offer in evi-

(Testimony of Charles W. Little.)

dence, your Honor, a piece of paper on which bears the name Sam Galbreath. It bears a serial number B-42288, Auburn, California, 10-31-46, sold to Herold Lumber Company, One Customaire—spelled (Spelling) a-i-r-e—\$55.50 CHG; sales tax \$1.38; total \$56.88. I believe the initials are D. G. We will offer the document in evidence as Plaintiffs' Exhibit first in order, your Honor.

The Court: Received.

The Clerk: Plaintiffs' Exhibit 1.

(The document referred to was marked Plaintiffs' Exhibit 1 in Evidence.)

Mr. Castro: I show you Plaintiffs' Exhibit 1, referring to a Customaire Heater. Was that the heater which was delivered, which was brought to the Herold Lumber Company?

Mr. Desmond: Just a moment, we are going to object. There is no foundation laid at this time to show any [18] connection by this witness with this particular tag. Now he can testify what was brought there, your Honor, but he certainly can't draw a conclusion from this sales invoice.

Q. (By Mr. Castro): All right, did you pay for that sales invoice?      A. I did.

Mr. Castro: I think that is the connection, your Honor.

Q. (By the Court): Where did you first see it?

A. The invoice or the stove?

Q. Yes.



(Testimony of Charles W. Little.)

A. The invoice first I saw it was when the bill was sent to the Herold Lumber Company.

Q. How was it sent?           A. The bill, by mail.

Q. You received it through the mail?

A. That's right.

Mr. Desmond: If your Honor please, I might clarify that point. I believe the witness said he received the bill, not the invoice.

Q. (By the Court): You mean you received the invoice that you have in your hand in the mail?

A. No, we didn't receive that.

Q. Where did you receive that? That was my question.

A. I believe the Herold Lumber Company has a copy of this—or I mean a yellow slip which is generally given on delivery. [19]

Q. You mean by that that you received a yellow slip which is a copy of the exhibit you have in your hand?

A. Well, I couldn't swear to it that we did.

Q. What became of that slip?

A. That I couldn't say.

Q. Did you destroy it in the fire?

A. Well, it might have been.

Mr. Desmond: No, your Honor, we have a note in the file that the original was sent to the plaintiffs in this action.

The Court: What is that?

Mr. Desmond: We have a note in the file that

(Testimony of Charles W. Little.)

the original was sent to the plaintiffs in the action.  
I have a statement here——

Mr. Castro: You can't tell by the statement.

Mr. Desmond: Have you completed with that statement?

Mr. Castro: Just a moment.

The Court: Can't you speed it up?

Mr. Desmond: Yes, I would like to.

Mr. Castro: At this time, we offer in evidence a document entitled Statement, Sam Galbreath Petroleum Products, 'Phone Auburn 30R, 124 Finley Street.

The Court: Lay the foundation. Where did it come from?

Q. (By Mr. Castro): Would you examine this document bearing date October 31, 1946? [20]

A. (Witness examines document.)

Q. Did you receive that?

A. Well,—I probably did.

Q. And at the time it was received, were any invoices attached to it as indicated?

A. That I can't tell you.

Q. Do you know whether or not——

A. We had a bookkeeper take care of the mail.

Q. Do you know whether or not invoice referred to as dated October 27, '42, number 42277, was actually attached to that statement?

Mr. Desmond: Now, just a moment, Mr. Little, I want to object.

(Testimony of Charles W. Little.)

The Court: The witness says he probably received it.

Mr. Castro: We will mark it for identification.

The Clerk: Plaintiffs' 2 for identification.

(The document referred to was marked Plaintiffs' 2 for identification.)

Q. (By Mr. Castro): Now, what was your official capacity at the Herold Lumber Company?

A. Yard manager.

Q. And you had been yard manager for approximately how long? A. Well, three months.

Q. You may take the stand.

(The witness resumed the witness stand.)

Q. Were you acquainted with Roy Albers?

A. Yes.

Q. And how long have you known Mr. Albers?

A. Well, about two months and a half.

Q. At what time was it that you had known him for about two and a half months?

A. Right at that time, previous to the 31st of October.

Q. Now, did you send him for a heater?

A. Yes.

Q. And, did he pick up a heater and bring it to your place of business? A. Yes.

Q. And do you know what kind of a heater that was?

A. I couldn't tell you the name. It was an oil heater.

(Testimony of Charles W. Little.)

Q. And do you know where that oil heater was placed in your premises?

A. It was placed inside the office.

Q. Where about in the office?

A. That I couldn't say.

Q. (By the Court): Did you see it there?

A. I saw it delivered, that's all.

Q. After it was delivered, didn't you see it in the office?

A. I saw it in there but it was just in back of the counter.

Q. (By Mr. Castro): Now, did somebody come there after the heater was delivered to install it?

A. Yes.

Q. And can you identify who came there?

A. Well, the person that came over there first I had never seen before.

Q. Is he present in the courtroom this morning?

A. He is not.

Q. He is what?           A. He is not.

Q. All right, did someone else come over?

A. Later, yes.

Q. How did the first man come over?

A. Came over in a pick-up.

Q. And did that pick-up have any identification on it?           A. Not that I know of.

Q. And who came over later?

A. One of Mr. Galbreath's—

Mr. Desmond: I am going to object.

(Testimony of Charles W. Little.)

Q. (By Mr. Castro): What was the name of the man who came over later?

A. Well, I know him as Harry.

Q. (By the Court): As who? A. Harry.

Q. (By Mr. Castro): And is he present in the courtroom today? A. Yes. [23]

Q. Would you point him out?

A. He is on the bench directly in back of Mr. Galbreath.

Mr. Castro (To man referred to): Would you stand up for the purpose of the record?

(The person spoken to arose and gave his name as Harry Gregory.)

Q. (By Mr. Castro): Now, the first man that came there, did you later see him with Mr. Gregory?

A. Yes, I saw him around there. I was mostly out in the yard. I was very busy checking in and sending out loads of lumber.

Q. He and Mr. Gregory were together at various times? A. Well, I' could assume that they were.

Mr. Desmond: I am going to ask, please, that the answer go out.

Mr. Castro: Certainly it may go out.

The Court: No need to flare up about it; just make your objection.

Q. (By Mr. Castro): Did you see them together? A. Well, I can't say that I did.

Q. Did you see how Mr. Gregory came to the Herold Lumber Company?

(Testimony of Charles W. Little.)

A. I didn't see when he came.

Q. Now while he was there did you see any vehicle there?

A. Their pickup that I speak of was there all afternoon—— [24]

Q. Now——

A. (Continuing): ——up until the time that I left that I know of.

Q. Did you see Mr. Gregory in and out of the Herold Lumber Company office?

A. I saw him a couple of times. I wasn't near the office, however.

Q. But did you see him going in and out of the office?      A. Yes.

Q. Now, did a fire take place on October 31, 1946, at the Herold Lumber Company office?

A. Yes.

Q. Were you present at the time of the fire?

A. No, not when it started.

Q. Where were you?      A. I was at home.

Q. And what were you doing?

A. I had just gotten out of the bath tub.

Q. And with relation to a conversation, were you having a conversation with anybody?

Mr. Desmond: To which we object.

The Court: Overruled.

Mr. Castro: I am not asking for the conversation.

Q. You may answer.      A. Yes. [25]

Q. Who with?      A. My brother.

Q. What is his name?      A. J. E. Little.

(Testimony of Charles W. Little.)

Q. . And how were you talking to him?

A. Telephone.

Q. Did you furnish any material for the installation of that oil heater?      A. No.

Q. Did you get a bill for the material used in the installation of an oil heater?      A. Yes.

Q. From whom?      A. From Mr. Galbreath.

Q. Do you have a copy of it?

A. (Witness hands document to Mr. Castro.)

Mr. Castro: At this time, we offer in evidence a statement: Sam Galbreath Petroleum Products, Serial No. B-10543, Auburn, California, 10-31-1946; Sold to Herold Lumber Company, Copper Tubing, 23 feet, price 15, total 3.45; Fittings, 3, price 40, total 1.20; Value 1.00; Bushings "CHG" 2, 20, total .40; Drum, \$4.00; Stove Oil, 38, price 10, total \$3.80; Sales Tax .35; Total \$14.20; Drivers initials "C. L."

The Court: No foundation has been laid for its introduction. [26]

Mr. Desmond: We ask that these be produced; and I don't think counsel disputes the fact, your Honor.

The Court: It should be connected up either by testimony or by stipulation with counsel. No use to put it in evidence without any foundation for it.

Mr. Castro: Do you have any objection?

Mr. Desmond: We are going to make the objection at this time, your Honor, that there has been no identification made. If he wants to introduce it

(Testimony of Charles W. Little.)

for identification, that is another matter.

The Court: Sustained.

Q. (By the Court): You said you got a copy of that or you got some sort of statement is that it?

A. Well we always customarily received one.

Q. Do you have any independent recollection of receiving it?

A. No, I haven't any more than I do know that I had an itemized statement of the fittings that were used.

Q. (By Mr. Castro): Would you examine this document? (Handing document to witness.)

Mr. Desmond: May we see it, counsel?

Mr. Castro: Yes. (Handing document to Mr. Desmond.) The handwriting on there is mine, indicating the first exhibit offered in evidence.

Q. I show you a document on the letterhead of the Herold [27] Lumber Company, Inc. Are you familiar with that paper?

A. It is a copy of the itemized statement.

Q. (By the Court): Did you ever see it before?

A. Well, I probably saw it when I paid the bill, when I signed the check.

Q. Do you know that you received it or do you not know that?      A. Received the statement?

Q. Yes.

A. Yes, I know that we received the statement. Otherwise I wouldn't have signed the check paying the bill.

Q. Have you got a notation there indicating it is paid?      A. No, this is a copy.



(Testimony of Charles W. Little.)

(Discussion was had off the record about the document referred to.)

Mr. Desmond: If your Honor please——

The Court: Any statement unsworn by counsel won't be accepted by me, so you don't need to make any objections.

Mr. Desmond: I am going to object to the document itself on the ground that it is purely self-serving. It is the document that the plaintiffs prepared in their own office.

Mr. Castro: It is the identical duplicate of plaintiffs' Exhibit No. 1 in this case, and plaintiffs' exhibit which it was going to offer next covering the fittings of the stove. [28]

The Court: If you can prove the foundation as having come from the defendant, I will receive it; but if this is a statement prepared by this witness, I will not receive it unless you can prove the loss of the original and prove that is a copy.

Mr. Castro: I will ask that this document, Serial Number B-10543 be marked for identification.

The Clerk: Three for identification.

(The document referred to was marked Plaintiffs' No. 3 for Identification.)

Mr. Castro: As I understand it, your Honor, at the pre-trial conference there was a stipulation that both these invoices, Plaintiffs' Exhibit No. 1 and

(Testimony of Charles W. Little.)

Plaintiffs' Exhibit No. 3 for Identification had been paid by the Herold Lumber Company.

Mr. Desmond: Plus another invoice, your Honor, for another charge entirely which has nothing to do whatever with the matter now before the Court.

Mr. Castro: That is correct.

Mr. Desmond: And we offer our objection that the check which counsel attempted to put in at that time showing a voucher attached on it was entirely self-serving and not a statement of the actual facts.

Mr. Castro: The check was withdrawn except as to the amount actually paid by the Herold Lumber Company to [29] Galbreath's organization.

The Court: Was it a cancelled check?

Mr. Castro: Well, your Honor, it is the carbon copy of the original check, and below, it has an invoice.

The Court: Well, counsel, you appreciate the rule that it cannot be received unless you prove the loss and destruction of the primary evidence.

Mr. Castro: I realize that, your Honor, but I thought they had stipulated that these invoices which I have in my hand covering the Customaire—covering the fittings of the Customaire heater and the third invoice pertaining to a battery were submitted to the Herold Lumber Company under a statement which is Plaintiffs' No. 2 for Identification, setting forth the three serial numbers that are on the statement, and were paid by the Herold Lumber Company.

(Testimony of Charles W. Little.)

The Court: Well, all I have in my note here is that the negligence is the only question left.

Mr. Castro: Now, is there any dispute in that?

Mr. Desmond: Our stipulation was, your Honor, that the check which Mr.—which counsel had presented at that time was in payment of these three items. That was the stipulation.

Mr. Castro: I think that is sufficient foundation for it.

Mr. Desmond: It didn't go beyond that at all.

Mr. Castro: I think that is sufficient foundation, your Honor, for the offer in evidence of the three statements to go with the billhead, covering the three statements—in other words, these invoices have been——

The Court: It doesn't necessarily follow that a check was stipulated for the three statements, that those statements are the ones that were received.

Mr. Castro: I don't think they are disputing the fact——

Mr. Desmond: Well, furthermore, your Honor, I think it goes to another question. The question here is: If there was a fire, was the fire—was the heater and the matters discussed here the proximate cause of the fire due to the negligence of the defendant Galbreath. Now I don't think these invoices go to prove that question.

The Court: I had an impression at this time that we were down to the question of negligence.

(Testimony of Charles W. Little.)

Of course, if the question of negligence would be embraced in the matter of proximate cause——

Mr. Desmond: That is right.

The Court: ——but here, we are spending a lot of time wrangling whether or not these were invoices which came from the defendant and paid by the plaintiff. I thought that was agreed upon.

Mr. Desmond: I think you are right about that, your Honor. [31]

The Court: If we spend any more time, can we get down to the question of negligence and proximate cause? Objections are being made by counsel for the defendant and it seems to me that they are not in harmony with the understanding reached at the pretrial conference.

Mr. Castro: Then, we would ask that these three invoices or rather invoices marked Plaintiffs' Exhibit 2 for Identification and Plaintiffs' Exhibit 3 for Identification, together with invoice bearing date: 10-8-46, B-42186—(Showing to counsel.)——

Mr. Desmond: These two are where our objection goes, your Honor. Our stipulation went to Exhibit 1 and 3 for identification, that the check which counsel produced at that time was in payment of this, together with another invoice. Now that other invoice to go with this statement is incompetent, irrelevant and immaterial, has no part of the case, and it does not help in any way to prove the issues. That is what our objection is to these matters.

(Testimony of Charles W. Little.)

Mr. Castro: Then, I stipulate that Plaintiffs' Exhibit 3 for Identification may be offered in evidence.

Mr. Desmond: Yes.

The Court: Those two that you have in your hand——

The Clerk: Number 3.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 3.)

The Court (Continuing): ——one and three.

Mr. Castro: One is already in evidence, your Honor.

The Court: All right.

Mr. Castro: You may cross-examine.

The Court: Cross-examination.

#### Cross-Examination

By Mr. Desmond:

Q. Mr. Little, you had considerable business, you testified, with Mr. Galbreath over a considerable period of time, is that correct?

A. That's right.

Q. Now, can you give us the time that you had this first conversation with Mr. Galbreath about a stove?

A. I couldn't give the date. It was sometime within, I would say, two weeks before the fire——sometime within that date.

Q. And you agreed to purchase a heater from them?

A. That's right.

(Testimony of Charles W. Little.)

Q. Now, you are sure you didn't go over and buy that heater on the morning of October 31, 1946?

A. Already been arranged that he had one when I was ready to get it.

Q. Did you go and get the heater?

A. I did not.

Q. Who went to get it?           A. Mr. Albers.

Q. Now, about that time, had you ever bought any other [33] heaters of a similar kind from Mr. Galbreath?

A. Well, I think that's about the third heater I bought from them.

Q. About the third?           A. Uh-huh.

Q. You bought one on the 10th of October, 1946?  
Mr. Castro: Objection.

The Court: Overruled.

Q. (By Mr. Desmond): Did you purchase the heater in the name of the Sonora Lumber Company at Forest Hill on October 10, 1946?

A. I imagine it was about that time.

Q. And that was a used heater?

A. That's right.

Q. Did you purchase anything else with that heater?

A. Well, I am not sure. I think I might have purchased some stovepipe. I am not sure about it at the present time.

Q. You purchased six joints of 6-inch stovepipe, didn't you?           A. That sounds right.

(Testimony of Charles W. Little.)

Q. And did you take that stove up to Forest Hill?

Mr. Castro: Objected to as irrelevant, immaterial and incompetent, no bearing on the heater in this case.

The Court: Overruled.

A. I didn't.

Mr. Desmond: Who did? [34]

A. One of the Sonora Lumber Company's pickups.

Q. Did you install it up there?

A. I did not.

Q. Who installed it?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial, no bearing upon the issue in this case.

The Court: Overruled.

Q. (By Mr. Desmond): Let me show you this Plaintiffs' Exhibit 1, Mr. Little. All that invoice calls for is one Customaire stove, is that correct?

A. That's right.

Q. Is there any charge there made for installation? A. No.

Q. Let me show you Plaintiffs' Exhibit 3, calling for fittings and oil and other things. Is there any charge made for installation?

Mr. Castro: Objected to as irrelevant, immaterial and incompetent, calling for the opinion of the witness.

The Court: It speaks for itself. Sustained.

(Testimony of Charles W. Little.)

Q. (By Mr. Desmond): Did you have any particular reason for wanting to have this heater in the office on the 31st of October?

Mr. Castro: Objected to on the grounds that it is irrelevant, incompetent and immaterial.

The Court: Overruled. [35]

A. We were trying to prepare the office so that I could move the bookkeeper from the house out to the office.

Q. You had just painted the office, had you not?

Mr. Castro: Objected to as assuming something in evidence not a fact.

The Court: Overruled.

A. It had been painted the day before.

Q. (By Mr. Desmond): What was it painted with? A. Standard Oil floor hardener.

Q. And that was the first material that went on the walls, was it?

A. That's the first and only.

Q. First and only material? A. Yes.

Q. Didn't you have a conversation with Mr. Galbreath that you wanted to get that heater to dry out the walls? A. No.

Q. Now, what time was the office painted?

A. Well, it was painted the day before. I am not sure but what some of it had been done the day before that.

Q. Was any of it painted on the morning of the fire?

A. There was a little patch of floor in back of



(Testimony of Charles W. Little.)

the door in front of the counter that hadn't been painted because the fellow that was doing the painting the day before—it was quitting time and that hadn't been finished and I think the front of the counter.

Q. The walls in back of the stove or where the stove was placed?

A. They had already been painted.

Q. What? A. They had been painted.

Q. They had been painted. Now, let me ask this question, Mr. Little: When these invoices are dated October 31, 1946, was that the date on which the deliveries were made?

A. That's the date of delivery and installation.

Q. Date of delivery and installation?

A. That's right.

Q. In other words, the stove was delivered to your office and installed on the same day, is that correct? A. That is correct.

Q. You were not there at the time the stove was installed or lit, were you?

A. I was in and out of the office maybe three or four times and I was out in the yard all afternoon.

Q. You were not there, you were at home I understand.

A. That's right. I had left maybe a half an hour or so before the fire to prepare myself for a late night.

Q. Now, you testified that you knew Mr. Albers, the gentleman that testified before you, is that right?

(Testimony of Charles W. Little.)

A. That is correct. [37]

Q. And, you state now that the stove was delivered to your plant and installed on the same day?

A. That's right.

Q. Yet, you said you sent Mr. Albers for this stove?           A. I did.

Mr. Desmond: That is all.

### Redirect Examination

By Mr. Castro:

Q. Now was there an oil storage tank to be used with this heater?           A. That's right.

Q. And where was it located?

A. Approximately in the center of the building or at the center of the building, on the Sacramento Street side to the building.

Q. Can you indicate on the diagram, please?

(Witness goes to blackboard and indicates.)

Q. Would you mark "Tank"?

(Witness writes on diagram.)

Q. Now did you have any discussion with Mr. Harry Gregory concerning where that tank was to be located?

A. I think it was the other fellow that came over there with the pickup first. I just told him where I wanted to put the tank.

Mr. Desmond: Of course, Your Honor, I think that conversation is objected to upon the ground

(Testimony of Charles W. Little.)

that it did not take [38] place in the presence of the defendant.

The Court: What?

Mr. Desmond: It didn't take place in the presence of Galbreath.

The Court: Who was the conversation with?

Mr. Miller: Harry Gregory.

Mr. Desmond: Identified as Harry Gregory.

The Court: Let us connect it up. I assume that they have proof later on that he is the agent of the defendant. Unless it is connected up——

Mr. Castro: That is the purpose of it, your Honor.

The Court: You may prove it. Strike it.

Q. (By Mr. Castro): Can you state that conversation?

A. I told Mr. Galbreath's man where——

Mr. Desmond: I ask that that go out.

The Court: You told that man Gregory, you mean?

Q. (By Mr. Castro): No, you didn't tell Harry?

A. No, I said that the man came over there first with the pickup.

Q. (By the Court): You told him what?

A. I told him where to put the tank and the tubing to run under the floor and away from the open space in back where it wouldn't be interfered with by lumber being put in there.

Q. (By Mr. Castro): And did you indicate where the heater was to be connected in the office?

(Testimony of Charles W. Little.)

A. The location of the heater was already placed by the outlet into the patent flue.

Q. Where was the outlet on the patent flue?

A. Right in here.

Q. What? Would you indicate that with chalk, please? A. (Witness indicates.)

Q. Now, was the tank and the stove connected that afternoon?

A. I would say that they were.

The Court: Well, do you know whether or not they were connected?

A. Well that's what the men were there for and that's what——

The Court: You don't know whether they were connected or not?

A. Yes, they were connected.

The Court: I thought you said you didn't observe what they were doing.

A. Well, that's what they were there for and the stove was connected.

The Court: It was connected, you say that?

A. It was connected, yes.

The Court: All right.

Q. (By Mr. Castro): Now, have you ever seen that man that was there with Harry Gregory again?

Mr. Desmond: We object to that as assuming something not in evidence.

The Court: Overruled. [40]

A. No.

(Testimony of Charles W. Little.)

Q. (By Mr. Castro): Did you know his name?

A. No.

Mr. Castro: You may cross-examine.

Recross-Examination

By Mr. Desmond:

Q. Who constructed the platform on which the oil was placed?

A. One of Mr. Wold's men.

Q. Who is Mr. Wold?

A. Mr. Wold is the contractor who had the job of furnishing the labor for this building.

Q. Did you tell this man that you referred to, that you showed Mr. Galbreath's man where to put the oil barrel?      A. Yes.

Q. Did you tell him what to do with the tubing?

A. I did not, except to run it in back of the foundation under the floor.

Q. Running it under the floor?

A. That's right, sir.

Q. Did they have anything to do with installing the chimney?      A. No.

Q. Was there any stovepipe purchased with this stove?

A. Well, I don't remember whether there was any stovepipe purchased or whether we had some there or not.

Q. You are not sure? [41]

A. I know that Mr. Galbreath had what was necessary to set it up, so I can't answer that.

(Testimony of Charles W. Little.)

Q. Well, there was no stovepipe listed on the invoice, is there?      A. I noticed that.

Q. Do you think you used some stovepipe of your own there?

A. Well that I can't answer.

Q. You don't know?

A. If there was some——

Q. Do you know who installed the stovepipe?

A. The stovepipe?

Q. Yes.

A. Or the flue?

Q. The stovepipe or the flue?

A. Or the flue?

Q. The stovepipe.

A. The stovepipe from the stove to the flue?

Q. Yes.      A. I do not.

Mr. Desmond: That is all. Just a moment——

Q. Would you know the man that you saw around there before Mr. Gregory came, if you saw him again?

A. Well, I am not sure that I would.

Q. Would you mind looking at the gentlemen in the courtroom to see if you can identify the man?

A. Well, I don't see anybody that I could identify as such.

Mr. Desmond: That is all.

#### Redirect Examination

By Mr. Castro:

Q. Now, the painting which had been done on the day of the fire was in what area in the office?

(Testimony of Charles W. Little.)

A. The painting the day of the fire would have been right in this area, in back of the door in front of the counter. (Indicating.)

Q. Would you mark that with an X-1?

A. (The witness makes a mark on the diagram.)

Mr. Castro: That is all.

Recross-Examination

By Mr. Desmond:

Q. Are you familiar with the type of material that is known as Standard Oil floor hardener?

A. Well, no, not too familiar with it.

Q. Do you know whether or not it is inflammable?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid, and calling for an opinion.

The Court: Overruled.

A. I would say it was.

Q. (By Mr. Desmond): It was? A. Yes.

Mr. Desmond: That's all.

The Court: Recess. [43]

(A recess was taken at 10:00 o'clock a.m.)

Mr. Castro: Mr. Jack Little.

JACK E. LITTLE

Called by the plaintiffs, sworn.

Direct Examination

By Mr. Castro:

Q. What is your name in full?

A. J. E. Little.

(Testimony of Jack E. Little.)

Q. Where do you live? A. Forrest Hill.

Q. And how long have you resided there?

A. About two years and a half.

Q. Prior to that date, where did you make your home? A. Sacramento.

Q. What is your occupation?

A. At the present time, I am in the lumber business.

Q. How long have you been in the lumber business? A. Two years and a half.

Q. Are you acquainted with the Herold Lumber Company located at Auburn, California?

A. Yes, sir.

Q. And were you at that place of business on the 31st day of October, 1946?

A. If that's the day of the fire, I was there.

Q. And what time of the day did you get there?

A. Well, it was late afternoon, I think, around four o'clock. [44]

Q. And when you got there, did you go into the office of the Herold Lumber Company?

A. Yes.

Q. And what was in that office when you went in?

A. Well, there was only two desks and a stove, chairs, and a counter.

Q. Were there any other people in the office besides yourself? A. When I went in there?

Q. Yes. A. I think so.

Q. And were they men or women?

A. Men.



(Testimony of Jack E. Little.)

Q. Was Harry Gregory present in the Court-room one of those men?      A. Yes.

Mr. Desmond: We submit that as leading and suggestive, your Honor; objected to on that ground.

The Court: Overruled.

Q. (By Mr. Castro): And was there anybody besides yourself and Mr. Gregory?

A. When I first went into the office, Glenn Carns was in there.

Q. (By Mr. Miller): What was that name?

A. Glenn Carns. And there was another workman in there [45] working on the stove.

Q. (By Mr. Castro): And do you know the name of that workman?      A. No, sir.

Q. What was Mr. Gregory doing?

A. I didn't pay any particular attention what either of them were doing except that they were working on the stove installation.

Q. Now, how long did you remain in the office?

A. Well, the first time I went in, I was only in there a few minutes, long enough to make a long distance call.

Q. What did you do then?

A. I was out in the yard where they were loading lumber, probably back in the office several times until I finally went in to make some telephone calls.

Q. And who did you go in to make a telephone call to?

A. Oh, I don't recall who I may have called

(Testimony of Jack E. Little.)

except that at the time the fire started, I was talking to my brother Charles.

Q. Now, where was that stove located?

A. Well, the stove was located on the east side of the room.

Q. Would you indicate on the diagram approximately the location of the stove?

A. (The witness goes to the blackboard.)

Q. Here is a piece of chalk. Draw a line from that rectangle and mark it "Stove." [46]

A. (Witness draws on diagram.)

Q. Do you know what type of stove that was?

A. I know that it was an oil stove.

Q. You may have a chair. (The witness takes the witness stand.)

Now, when you returned in to the office the second time, did you see the other man or Mr. Gregory, or both of them in the office?

A. Both of them in there.

Q. And what were they doing on that occasion?

A. Well, they—while I was telephoning, I don't know what they were doing. When I came in, while I was telephoning, Mr. Gregory lit the oil stove.

Q. Will you describe how he—

A. I might say prior to that time, he mopped up the floor under the stove with a wiping rag and then lit the stove.

Q. Describe how he lit the stove.

A. Well, he opened the port and threw a match in.

(Testimony of Jack E. Little.)

Q. And then what happened?

A. Well, a sort of puff, and then everything happened so fast, the next thing I noticed there was a square of fire under the stove.

Q. Where was that fire with relation to where the wiping had been?

A. Well, it was in that area. It was—the strange part [47] of it was that the fire was almost exactly the dimensions of the stove, as though the lines had been drawn in a square.

Q. Now, did Mr. Gregory do anything after the puff or poof that you have described?

A. Yes, he took his jacket and attempted to beat it out.

Q. And when he did that, what happened to the fire?      A. Well, nothing happened to it.

Q. Did it spread in any direction?

A. Well, it was spreading at the time.

Q. Now, did he do anything with the heater itself?

A. Yes, he attempted to pick it up and tripped with it, and, of course, it was fastened down with a copper tube, and my impression is that when he let it go, the stove fell on its side.

Mr. Desmond: I will object to that, your Honor, as being the opinion of the witness, and that it be stricken.

The Court: He is giving his best recollection as to what happened. Overruled.

(Testimony of Jack E. Little.)

Q. (By Mr. Castro): And then, after it fell on its side, what took place?

A. We all got out of there.

Q. And then what happened?

A. Well, almost immediately after it, I hung up the 'phone which I did as soon as I saw the fire. The fire started up the inside of the wall. It traveled up the wall like a [48] raising a curtain. It almost immediately spread the full width of the room, went up the wall and across the ceiling and started down the other sides.

Q. And then did you leave it?

A. I went out on my hands and knees.

Q. And did the other two men do likewise?

A. I presume they went out the back door. I wasn't watching.

Q. Did you see them on the outside?

A. Not that I can remember.

Mr. Castro: You may cross-examine.

#### Cross-Examination

By Mr. Desmond:

Q. You stated, Mr. Little, that a man by the name of Glenn Carns was present.

A. He was present not at the time of the fire but before.

Q. Well, when did you see him then?

A. I saw him the first time I went in to telephone.

Q. And that was approximately 4:00 o'clock?

(Testimony of Jack E. Little.)

A. Probably around 4:00 o'clock or perhaps a little bit later.

Q. By the way, who was he employed by?

A. Mr. Carns was salesman for the Herold Lumber Company.

Q. I see, and you say there was another workman. Who was that, do you know?

A. When I first went in the office, there were some carpenters working on the counter and these men working on the stove, and there may have been others going in and out on a building [49] under construction.

Q. Had carpenters been working there all afternoon? A. I couldn't say. I wasn't there.

Q. But you were there working in this office at 4:00 o'clock when you first arrived? A. Yes.

Q. Were there any painters working in there?

A. Not that I can remember.

Q. Had there been painters working there that day? A. That I don't know.

Q. Do you recall, by the way, what time this fire was?

A. Well, it was shortly before five. I don't have the exact time of it.

Q. And the stove—had the stove been burning prior to that time?

A. I think so. It was quite cold outside that day and I went inside because it was warm in there.

Q. I see. That was when, about 4:00 o'clock?

A. Yes.

(Testimony of Jack E. Little.)

Q. I see; and the stove was burning at that time?

A. I don't know that it was burning—it was warm in the office.

Q. Uh-huh. Now, you stated, you made some telephone calls. A. Yes.

Q. Do you recall who you 'phoned? [50]

A. I called the Herold Lumber Company office in San Francisco immediately that I got there. I am not sure, I may have called after there, except the——

Q. Did you have any conversation with the Herold people in San Francisco regarding insurance?

A. Yes.

Q. What was the conversation?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial.

The Court: What is the competence?

Mr. Desmond: I think we can connect this up, your Honor, into other very material facts.

The Court: State how you expect to connect it up, to what proof?

Mr. Desmond: Well, we offer to prove that at that time within—during these conversations, Mr. Little was either instructed to increase the insurance on the property there and that he had actually increased the insurance on the property within a few minutes before the fire. We also will prove that at the time Mr. Little failed to send in a fire alarm to make any attempt or effort to reduce any damage which might be caused by the fire and that,

(Testimony of Jack E. Little.)

actually, he instructed the fire chief of the volunteer fire department to stop playing water upon the fire. The purpose, of course, being that there is a proof of loss here in stipulation that a total [51] amount of ninety-two hundred and some dollars was paid as loss. It is our contention that the circumstances will prove that that loss could have been very materially reduced.

The Court: I will receive it. Overruled.

Q. (By Mr. Desmond): Did you have a conversation with the Herold Lumber Company with reference to insurance?

Mr. Castro: Same objection, your Honor,—

The Court: Overruled.

Mr. Castro —to the entire line of questioning.

The Court: Answer it.

A. Yes, I did.

Q. (By Mr. Desmond): What was that conversation?

A. I asked what the amount of insurance was in force and whether or not there was any insurance on contents, and when I received the answer, I suggested that the insurance be increased.

Q. I see. What amount of insurance was on this building? A. I don't remember.

Q. Well, did you later have it increased?

A. I had it increased right then.

Q. Who did you contact to increase it?

A. It was increased through Mr. Barroca.

Q. Who is he? A. He is our broker.

(Testimony of Jack E. Little.)

Q. In Auburn? [52] A. In San Francisco.

Q. I see. Did you 'phone to Mr. Barroca?

A. I 'phoned the Herold Lumber Company office and left the message.

Q. To increase the insurance? A. Yes.

Q. Now what was the amount of insurance on the building at that time? A. I don't recall.

Q. You don't know? A. No.

Q. Did you take out the building permit in the City of Auburn for the construction of the building? A. No, I think not.

Q. Do you know who took out the building permit?

A. I imagine it was gotten out by Mr. Wold.

Q. Do you know what the amount of the permit was?

Mr. Castro: Objected to as immaterial, incompetent and irrelevant, the damage has been stipulated hereto as the loss of so many—about five thousand on the building and forty-one hundred, I believe, on the merchandise.

Mr. Desmond: No, the only stipulation that was made was that there was insurance, and the proof of loss as presented here was that that had been paid. Now, we have, I think, under the complaint where they allege that they suffered [53] certain damages. The mere fact that they paid it is not binding upon this third party who is accused here of starting a fire. We will prove that is the situation.



(Testimony of Jack E. Little.)

Mr. Castro: May I address the Court a moment, your Honor? If I understand counsel's position at this time of putting in dispute the loss which occurred there as to the value of the building which was destroyed and as to the value of the merchandise destroyed, I thought that pretrial conference had addressed itself to that point and it was stipulated that it was in negligence.

The Court: I thought so too, but there was no order on the pretrial conference—no formal order made, and all I have in my notes is that the only issue is to the issue of negligence. I am quite sure, Senator, that at that conference you so stated that the only issue to be tried was the issue of negligence.

Mr. Desmond: I thought, also, your Honor, the question of damages was involved. Now, perhaps I am in error and if I am, I certainly want to correct my situation at this time. My understanding of the stipulation concerning the proof of loss was that the loss was paid in the amount specified, but we questioned the amount of damage.

Mr. Castro: No, that is the first time I have heard that. I would have certainly brought more witnesses here if that point was going to be in issue. [54]

The Court: Well, I am going to hold you to your pretrial stipulations and if you take it up with the reporter during the noon hour, and if there was such a stipulation made, and too, it is my best recollection that was the understanding that there was

(Testimony of Jack E. Little.)

no issue in this case except the question of negligence.

Mr. Desmond: Well, we will defer it then until we check it.

The Court: I think you had better defer any examination along this line until you clear that up.

Mr. Desmond: Very well.

Q. Did you see this stove lighted, Mr. Little?

A. Yes.

Q. Which are we to believe now. You have stated the room was warm when you went in there. Now you state that while you were there, the fire was lighted. Now which is correct?

A. I would say that both are correct.

Q. Both are correct? It had been burning then before you went in?

A. I don't know. I just know the room was warm.

Mr. Miller: He said "I believe so."

Q. (By Mr. Desmond): Were you there from the hour of 4:00 o'clock till the fire started in the office?

A. No, not all the time.

Q. Well, I thought on your direct testimony you stated you [55] went in the office, you arrived around 4:00 o'clock, you were in there for a few minutes, went out into the yard. Now how long did that take?

A. I don't know. I was in and out several times.

Q. You were in there for these several conversations how long; did they all occur at the same

(Testimony of Jack E. Little.)

time? A. No.

Q. They were from the time you were going in and out? A. That's right.

Q. And all of that time you say Mr. Gregory was there and another workman?

A. No, I don't say that they were there all of the time.

Q. Now just clear that up, will you please?

A. Yes, I can't say where they were when I went in the room.

Q. Were they in and about the building there all the time? A. Yes.

Q. Both of them?

A. I can't answer as to that.

Q. Can you identify the other workman?

A. I doubt it.

Q. You know whether or not he is in court to-day?

A. I haven't seen anybody here whom I would recognize as being that man.

Q. Do you know the names of these carpenters that were in the [56] room?

A. No, I don't know the names of any of them.

Q. Do you know the names of any painters?

A. No.

Q. Now was this building constructed under your supervision?

A. Well, no, not exactly. I had no official connection with the Herold Lumber Company. I drew up the original drawings for the building. The

(Testimony of Jack E. Little.)

Herold Lumber Company is affiliated with the Sonora Lumber Company of which I am in charge of the Forrest Hill end, and the building was built under the supervision of Mr. Wold, the contractor.

Q. Do you know whether or not he employed the painters?

A. No, I don't know, but I presume he did.

Q. You don't know who did the painting then?

A. No, sir.

Q. Now do you know what the walls of this office were painted with?           A. No.

Q. Isn't it a fact that they were painted with Standard Oil hardener?

Mr. Castro: He says he don't know.

Mr. Desmond: Oh.

Mr. Castro: We will stipulate to it, counsel. We have no objections to it, your Honor. It was painted with Standard Oil floor hardener which was provided by the Sherwood-Williams [57] Company and sold as a Standard Oil product. The point of inflammation is 105 Fahrenheit. The flash point is 105 degrees.

Mr. Desmond: Will you stipulate it's a material highly inflammable?

Mr. Castro: I will not and you can't get a witness to prove that either.

Q. (By Mr. Desmond): Isn't it a fact, Mr. Little, that this Mr. Gregory picked up a coat off the desk on your counter there and attempted to move the stove?

(Testimony of Jack E. Little.)

A. I don't know where he got the coat. The thing he was beating the flames with, in my recollection, was a leather jacket—whether he had it on the counter—

Q. You testified on direct examination that he took it off—took his coat off. Which is correct?

A. I don't know.

Q. You don't know. Now did you see the fire on the wall about the time it started?

A. I didn't see the fire on the wall for several seconds after I saw the fire on the floor. In fact, I didn't see the fire on the wall until after Mr. Gregory had picked up the stove.

Q. Did you have—could you see the wall from where you were sitting, immediately behind the stove?      A. No, sir.

Q. You couldn't see the wall? [58]

A. No.

Mr. Desmond: That is all.

### Redirect Examination

By Mr. Castro:

Q. Where were you at the desk, could you indicate on the diagram where you were when you saw the fire start?

A. (Witness goes to diagram and indicates.) Well, now, I believe that I was in between the desks.

Q. And facing in what direction?

A. Facing the stove, either here or here (indicating)—I am not sure. If the desks were close together, I was sitting here.

(Testimony of Jack E. Little.)

Q. Mark that "X-1" as the position of the witness at the time you saw the fire. At that time you were facing in what direction?

A. I was facing directly towards the stove.

Q. And where was Mr. Gregory?

A. At the time the fire started?

Q. Yes.

A. He was on this side of the stove. (Indicating.)

Q. That will be a point which we will mark as "X-2."

A. I mean I don't know where he was when the fire started, but he was about here when he started to beat the flames.

Q. Mark "X-2" as the position of Mr. Gregory at the time he was beating the flames. [59]

A. (Witness marks on diagram.) Immediately before that, I couldn't see where either man was standing.

Q. Did you see Carns do anything at all with the stove?

Mr. Desmond: Just a minute. I missed that name. Mr. Who?

Mr. Castro: Carns.

A. Mr. Carns was not in the—Carns to the best of my recollection was not in the room at the time the fire started.

Q. Do you know where Mr. Carns is today?

A. Mr. Carns is dead.

Mr. Castro: You may cross-examine.

(Testimony of Jack E. Little.)

Mr. Desmond: That is all.

Mr. Castro: No further questions.

Mr. Desmond: Just one.

### Recross-Examination

By Mr. Desmond:

Q. At the time, Mr. Little,—you, won't need to sit down—what was Mr. Carn's occupation?

A. He was a salesman.

Q. For the Herold Lumber Company?

A. For the Herold Lumber Company.

(Then there followed the testimony of Mr. Sam Galbreath.) [60]

Mr. Castro: Call Mr. Sam Galbreath for cross-examination under Rule 46-A of the Civil Procedure Act.

### SAM GALBREATH

Called by the plaintiffs under Rule 46-A of the Civil Procedure Act, sworn.

The Clerk: Will you take the stand, please?

### Cross-Examination

(Rule 46-A)

By Mr. Castro:

Q. What is your name in full?

A. Sam L. Galbreath.

Q. Are you the defendant in this action?

A. Yes, sir.

Q. Where is your place of business?

(Testimony of Sam Galbreath.)

A. Auburn, California; Sacramento Street.

Q. How long have you operated there?

A. Oh, 1930; eighteen years.

Q. Do you know Harry Gregory?           A. Yes.

Q. How long have you known him?

A. Oh, some ten or twelve years.

Q. During that time has he been in your employment?           A. Not all of that time.

Q. For how long?           A. Four or five years.

Q. What is that?

A. Some four or five years of that time he has, yes. [61]

Q. What period do those four or five years cover?

A. It covers from the present date back.

Q. In other words, he was in your employment during the month of October, 1946?

A. Yes, sir. Uh-huh.

Q. Now what were his duties?

A. Well he makes deliveries of fuel oil, or installs stoves, general driving for delivery. He also delivers gasoline and other petroleum products.

Q. Now, did you have anybody else in your employment on the 31st day of October, 1946?

A. Oh, yes.

Q. Whom else?

A. Well, I had—Dependener.

Q. How do you spell that?

A. (Spelling): D-e-p-e-n-d-e-n-e-r, Dependener.

Q. What is his first name?           A. Bert.



(Testimony of Sam Galbreath.)

Q. Is he still in your employment?

A. Yes.

Q. Anybody else?           A. Yes.

Q. Whom else?

A. Well, at that particular time, I had Cerino Lemos, Dependener, my oldest son—— [62]

Q. What is his name?

A. Jim H. Galbreath. There was five at the time, if I recall; Cerino Lemos and another boy.

Q. How do you spell Lemos?

A. (Spelling): L-e-m-o-s.

Q. Is there a fifth man that you do not recall?

A. I don't seem to be able to recall that particular one.

Q. What was the man's duties whose name you don't recall?

A. Well, he first was a mechanic. He had Gregory, Galbreath and Dependener and Lemos.

Q. (By the Court): Well, did you have anybody that was working with Gregory on the date of this fire?

A. He wasn't on the truck with him, your Honor. However, he was working. He is the boy that delivered the tubing and the drum.

Q. What is that man's name?

A. Cerino Lemos.

Q. (By Mr. Castro): Did you direct him to deliver those fittings there to the Herold Lumber Company?           A. Yes; uh-huh.

(Testimony of Sam Galbreath.)

Q. And those are the fittings described in Plaintiffs' Exhibit No. 3?

A. Yes, it's the ticket with the boy's initial on it.

Q. That's what the CL stands for?

A. Yes; C. L. Lemos. [63]

Q. And do you recognize the initials on Plaintiffs' Exhibit No. 1?           A. Oh, yes.

Q. Whose initials?

A. They are Mrs. Galbreath's. D. G.—Dorothy.

Q. That is your wife or daughter?

A. My wife.

Q. Did she deliver the stove?           A. No.

Q. Now, the heater which was sold to the Herold Lumber Company was a Customaire heater?

A. Yes, uh-huh.

Q. Is that an oil or gas heater?           A. Oil.

Q. What size?

A. 30 or 35,000 B.T.U. capacity. I forget. There was the two particular sizes. If it isn't stated on that ticket, that is 35,000 B.T.U. If it is stated on there——

Q. It is not.           A. It's thirty-five, then.

Q. Now, I show you Plaintiffs' Exhibit 2 for Identification——

Mr. Desmond: Just a moment, your Honor, I don't believe that that was put in for identification.

The Court: Yes, it was.

The Clerk: Yes. [64]

Mr. Desmond: All right.

The Witness: I will have to see about that.

(Testimony of Sam Galbreath.)

Forty-two eight-six—that charge was for a battery.

The Court: There was no question put to you yet.

Q. (By Mr. Castro): Is that Plaintiffs' Exhibit No. 2 for Identification on your letterhead or statement head?

A. I don't quite get it, will you ask me that again.

Mr. Castro: Please read the question.

(Question read.)

A. Yes, this is our name, and the statement we mailed to the customer.

Q. And did it refer to invoices Numbers B-42277 and B-10543? A. Yes.

Q. Plaintiffs' Exhibits No. 1 and 3 respectively?

A. I don't know whether I have it or not. 10543 and the other number is 42227; however there is one here 42186 on there with that. Do you have that?

Q. That is the one, I believe, covering the battery. A. Oh, yes; I see.

Q. Now was that statement, Plaintiffs' Exhibit No. 2 sent to the Herold Lumber Company together with the invoices Plaintiffs' Exhibits numbers 1 and 3, the original or a carbon copy of those?

A. One or both of those would be attached to this one that was mailed to me, unless they were there. Their office was [65] open and they demanded or requested, or the boy offered them to them. However, in many cases, they are attached to the statement and mailed out.

(Testimony of Sam Galbreath.)

Mr. Castro: Now we offer this in evidence.

The Court: It is number 2 in evidence. It may be received.

(The document referred to was then received in evidence and marked Plaintiffs' Exhibit No. 2.)

Mr. Castro: (Exhibit No. 2 was then read into the record.)

Q. Now, had you sent Mr. Gregory to the Herold Lumber Company on the day of the fire?

A. No.

Q. Had you sent Mr. Lemos? A. Yes.

Q. What time had you sent him there?

A. Oh, between 10:30 and 12:00 o'clock; nearer 12:00 or 1:00. It was the middle of the day.

Q. You think it was somewhere near the middle of the day?

A. Yes, there is too much time elapse there.

Q. You think it was late in the morning or the first thing in the afternoon?

A. Well, I would say midday.

Q. Now, at that time, how did he go there?

A. Oh, he drove a ton pickup truck. [66]

Q. And who owns that pickup truck?

A. I own it.

Q. Had you been using it in your business?

A. Yes.

Q. Do you know how long Mr. Lemos remained there? A. No, I don't.

(Testimony of Sam Galbreath.)

Q. Can you tell me approximately?

A. Oh, I would say three hours.

Q. Do you know what he did?

A. Two and a half or three hours.

Q. Do you know what he did during that time?

A. Yes.

Q. What?

A. Well, he waited to build a stand to set this tank on.

Q. Is that the tank referred to in this diagram as—

A. It was the 50-gallon tank.

Q. Indicated by this circle?

A. I am not familiar with where it was sitting. I can't answer that.

Q. Did you furnish a tank for the oil?

A. Yes.

Q. What else did he do while he was there?

A. Well, I wasn't there myself; however, they are supposed to have put this drum on the stand and pumped oil in it and put the valve on; and it seems there was some delay in [67] in the waiting for them to complete the stand.

Q. Did you see him do anything with that oil drum or oil tank?

A. No, outside of loading at the plant.

Q. Did you instruct him to connect the oil tank with the heater?

A. Not with the heater.

Q. Did you instruct him to connect the tubing between the heater and the oil tank?

A. No.

Q. What did you tell him to do with that tubing?

(Testimony of Sam Galbreath.)

A. I told him to put a valve on and deliver the connections and tubing.

Q. Where was the valve to be put?

A. At the tank.

Q. And what was the purpose of putting that valve there?

A. To hold the oil. You can fill your tank with oil and it will retain the oil until you—whatever time it might be used.

Q. And then, does the tubing run from that tank to the heater?     A. Yes, sir; uh-huh.

Q. Do you know whether he connected the tubing to the tank and the heater?

A. No, I don't.

Q. Now, did you send Mr. Gregory there? [68]

A. No, I didn't send him there.

Q. Do you know whether Mr. Gregory went there that afternoon of the fire?     A. Yes.

Q. What time did he go there?

A. I don't know that.

Q. Can you tell me approximately?

A. No, I couldn't tell you approximately.

Q. Can you tell me whether he went there before or after Lemos?

A. He went there and gave him his orders to make some deliveries, but at what time it was, I don't know.

Q. "He went there." To whom are you referring?     A. Mr. Gregory.

Q. Did Mr. Gregory deliver something at the Herold Lumber Company?

(Testimony of Sam Galbreath.)

A. Not to my knowledge.

Q. He had some other deliveries to make?

A. Yes, sir.

Q. And did he make those deliveries?

A. The other deliveries; yes.

Q. And after he completed them, then did he go to the Herold Lumber Company?

A. Yes, sir.

Q. Can you tell me about what time he got there?

A. No, I can't.

Q. Or how long he remained?

A. No, I can't do that either. He was there when the fire started.

Mr. Castro: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Castro: That is the plaintiffs' case, I believe, your Honor.

Mr. Desmond: If your Honor please, we would like to make a motion at this time. I wonder if it wouldn't be better to postpone the matter until, say, 1:30?

The Court: You can make your motion; and I have got the grand jury coming in here in five minutes.

Mr. Desmond: At this time, your Honor, we would like to move for a non-suit. We base our motion upon the fact of the allegations in the complaint and the utter lack of proof submitted by the

plaintiff to substantiate the allegations in the complaint; the allegations in Paragraph IV. This is an action set forth in two causes of action, and both causes are identically the same with the exception, of course, as to the plaintiff named in the second cause of action. The whole theory of this case is predicated upon the recovery of the loss paid by reason of a fire which occurred at the Herold Lumber Company, which loss was paid by [70] the Home and Sun Insurance Companies, or Homestead Insurance Company, and now they come in to court with an action upon the theory that the proximate cause of this fire was the negligence in the installation of a stove which is identified here as an oil burning stove installed by the defendant, Sam Galbreath.

We don't deny the fact that the stove was sold by the defendant Galbreath to the Herold Lumber Company. We will go on, if required, and prove additional facts concerning it, but we believe that the plaintiff has not in any way substantiated his cause of action by one single iota of proof that, first: the fire was caused by reason of the stove; and secondly: the proximate cause of that fire was the negligent installation of the stove. There is absolutely no—there is certainly no clear-cut evidence here that the stove was actually installed by the defendant, Galbreath; and I think that is point number one they must prove. Point number two is that it was negligently installed, and they have



failed utterly to prove that. And point number three is that the negligent installation of the stove was the thing that caused the fire.

We believe that none of the allegations in that respect have been sustained by any of the proof produced by the plaintiff, and therefore move for a non-suit.

The Court: Now, gentlemen, I am going to recess until One [71] this afternoon. I am obliged to go to San Francisco in the afternoon, so I am going to get rid of it, if I can, before the afternoon is over—before I have to leave.

Mr. Castro: What time did your Honor want to leave?

A. I want to leave at 3:00 o'clock.

(A recess was taken until 1:00 o'clock p.m.)

Afternoon Session—May 11, 1948—1:00 p.m.

The Court: You may proceed.

Mr. Desmond: Call Mr. Galbreath.

The Clerk: Will you take the stand, sir? You were sworn this morning.

SAM GALBREATH

called by the defendants, previously sworn.

Direct Examination

By Mr. Desmond:

Q. I believe you have already been sworn, Mr. Galbreath. You are the defendant in this action?

A. Yes.

(Testimony of Sam Galbreath.)

Q. And I believe you have testified that your business is up in Auburn, and you operate a distributor plant—distribution plant?

A. Yes, sir.

Q. Now, Mr. Galbreath, do you know Mr. Jack and Mr. Charles Little?      A. Yes.

Q. Do you recall having a conversation at your plant with Mr. Charles Little concerning the sale of a stove?      A. Yes.

Q. When did that conversation occur?

A. Oh, somewhere between the 20th and 25th of October.

Q. 1946? [73]      A. Yes.

Q. Where did it occur?

A. At my plant—place of business.

Q. Was anyone else present?

A. I don't recall that.

Q. What was the nature of the conversation?

A. He wanted to purchase the stove and wondered if I might have it ready for delivery *with* a few days. No date of delivery was set. I told him that I could do that. He asked me to get together the necessary tubing and valve and the stove and the container for the oil, that he was going to heat his office.

Q. Did he have any conversation with you about drying out paint or anything of that sort?

A. Not at that time.

Q. I see. Now, when did you next see Mr. Little?

(Testimony of Sam Galbreath.)

A. Well, I saw Mr. Little almost daily. There was other transactions.

Q. Well, did he come to your plant to secure a stove?      A. Yes.

Q. Will you tell us the circumstances of that, please?

A. Well, I was under the impression—I am positive of one thing. That whoever picked up the stove, I set it over the platform and it was took away on the bumper of a car.

Q. Did you know who was driving that car? [74]

A. As to the conversation prior, they were going to have that stove installed by the time I could get the man there with the container.

Q. What was that?

Mr. Castro: May we have the time and place and the identity of the party, your Honor?

The Court: Proceed.

Q. (By Mr. Desmond): Did someone come to your plant from the Herold Lumber Company to secure the stove?      A. Yes.

Q. Who came there?

A. I was under the impression that it was Mr. Little.

Q. Which Mr. Little?      A. Charley.

Q. I see; and what day was that?

A. That was the 31st of October.

Q. 1946?      A. Yes.

The Court: You are not sure of that?

A. I am sure of the date.

(Testimony of Sam Galbreath.)

Q. You are not sure that Mr. Little himself came to get the stove?

A. No, sir; I am not, your Honor.

Q. You heard Roy Albers testify that he got it?

A. Yes. [75]

The Court: You are not prepared to say that that is not a fact?

A. I don't recognize Mr. Albers, and it occurs to me that I could if I had of saw him around there before. This is my first——

Q. Well, do you recall that somebody came there for the stove?

A. Oh, yes; very distinctly, sir.

Q. But you can't say whether it was Little or not? A. No; I was under that impression.

Q. (By Mr. Desmond): Do you know how they hauled the stove away from your place?

A. The bumper of a car.

Q. On the bumper of a car? A. Uh-huh.

Q. Now, that was on the 31st day of October, '46? A. Yes, sir.

Q. Now, did you have any conversation at any time with Mr. Little concerning the installation of the stove?

A. No, sir; nothing outside of the material. I ordered a valve for the tank and the tubing and connections. He didn't ask for an installation.

Q. Did the person who picked up the stove have any conversation with you? A. Yes.

Q. What was that conversation? [76]

(Testimony of Sam Galbreath.)

A. It was that he would have it set.

Mr. Castro: Now, let's identify that man. We object to it until the identity of the man is established.

The Court: He doesn't remember who it was, but he knows that a person got the stove and made that statement. Go ahead.

Q. (By Mr. Desmond): What did he state at that time?

A. He stated that he would like to have us get over there at the earliest convenience; that he would have the stove set and the stand built and that we would set the tank and put oil in it. They wanted to dry the office out.

Q. And then he took the stove away with him?

A. Yes.

Q. Now, did you bill him for that stove?

A. I took the account of it from off of the order. It was on an order on the desk, as we take orders for any merchandise we sell. I take it off and put it in my holder; and when I went home in the evening, I turned it in to the office.

Q. That was Mrs. Galbreath who made this ticket? A. Right.

Q. Now, I call your attention to Plaintiffs' Exhibit 1, this invoice. Now was any charge there made for the installation of a stove?

A. No, this is just one Customaire heater.

Q. It was for the stove itself and the sales tax;

(Testimony of Sam Galbreath.)

that was [77] the original charge that was made?

A. Yes.

Q. Now, later, did you give any instructions to Cerino Lemos concerning this transaction?

A. Yes.

Q. And was he your employee at that time?

A. Yes.

Q. And what were those instructions?

A. I instructed him to——

Mr. Castro: I move it is hearsay. Objected to on the grounds of hearsay.

The Witness: The container and the oil——

Mr. Castro: Just a moment, I have an objection.

The Court: You mean instructions as to his own employee?

Mr. Castro: Yes.

The Court: Overruled.

Q. What were your instructions?

A. To deliver the drum—that's the oil container; told him to put it on the stand when they had the stand ready and put enough oil in it for temporary installation; that they planned later on getting a larger tank.

Q. (By Mr. Desmond): Now, was that the material shown on the invoice, Plaintiffs' Exhibit 3?

A. Yes. [78]

Q. What is your practice with reference to charges when the heater is installed?

Mr. Castro: Objected to as irrelevant, incompetent and immaterial.

(Testimony of Sam Galbreath.)

The Court: Sustained.

Q. (By Mr. Desmond): Did you give any instructions to any of your employees any other than what you have recited here, to deliver this material to the plant of the Herold Lumber Company?

A. No, that's all.

Q. Did you have any arrangements with the Herold Lumber Company or any of its employees to install this stove?           A. No.

Q. Did you deliver any stovepipe for this stove?

A. No.

Q. Was any ordered from you?           A. No.

Q. Did you secure a permit from the Building Inspector of Auburn for the installation of a stove?

A. No.

Q. Is a permit from the Building Inspector of Auburn required when you install these oil stoves?

Mr. Castro: Objected to as calling for an opinion.

The Court: Sustained.

Q. (By Mr. Desmond): Now, Mr. Galbreath, does your name [79] appear on any of your trucks or trucking equipment?           A. No.

The Court: Did it at that time?

Q. (By Mr. Desmond): Did it on October 31?

A. No, sir; not at that time.

Q. Has it ever appeared on your trucks or trucking equipment?           A. Yes; in the past.

Q. What time?

A. Yes, in the past, my name was on all of them.

(Testimony of Sam Galbreath.)

Q. Now, this trip by Mr. Lemos delivering this merchandise, was that made on the afternoon of the same day that the stove was taken from your plant?

A. Yes.

Q. Did you go over to the lumber plant at any time during that afternoon?           A. No, I didn't.

Q. Were you there at the time of the fire?

A. No, not at the beginning of it, no.

Q. When did you arrive there?

A. Oh, I would say it was perhaps within the hour. I don't know how quickly it burned, but it was—well, a fire, half burned down. The top structure of it burned when I got over there. I was in town, heard the alarm, and made an inquiry. I was over at 124 Furnace Street, three quarters of a mile away. [80]

A. At that time, did you see Mr. Charles Little or Mr. Jack Little at the scene of the fire?

A. Yes.

Q. Did you have any conversation with them?

A. Yes, sir.

Q. Who else was present?

A. Oh, the fire chief was there; and there was two of the men working for me that had come across the street from getting dinner; a fellow named Brady. I recall that very distinctly.

Q. What is the name of the fire chief?

A. Getson.

Q. Did he have any conversation with Mr. Little, or did Mr. Little have any conversation with him



(Testimony of Sam Galbreath.)

at that time?

A. Yes, but I don't know what it was, sir.

Q. You weren't present during that conversation?  
A. No, sir.

Q. What was the fire department doing at that time with reference to putting out the fire?

A. Well, they were standing by the side of the road, but they wasn't running anything on it at the time when I arrived.

Q. Mr. Little was there at that time?

A. Yes.

Mr. Castro: Which Little is that?

The Witness: They were both there, sir. [81]

Q. (By Mr. Desmond): And did you have any conversation with them about putting water on the fire?

A. Yes. I asked them if they would, asked the Fire Chief to further distinguish it, that this oil plant was near by and I had a fear for the fire.

Q. What else occurred?

A. Well, he started running water on it again.

Q. The fire was still burning at that time?

A. Oh, yes.

Q. Now, did you see this barrel to which reference has been made, on this frame that has been identified here by Mr. Little?  
A. No, I didn't.

Q. Did you see the barrel at all?

A. Oh, yes; when it left the plant; when the boy was loading it at the plant, but not after it was installed.

(Testimony of Sam Galbreath.)

Q. Did you see it after the fire? A. Yes.

Q. What did you do with reference to the barrel and its contents at that time?

A. Oh, I asked one of the men to go across the track to the plant and get a gage stick and that we would perhaps be requested to pick the oil up and compensate the people for it.

Q. Now that oil—barrel of oil was near, right near the burning building, was it not? [82]

A. No, it had been moved out very near the street edge when I arrived. The fireman or some of the men working had moved it.

Q. Did that barrel have oil burn or explode?

A. No, sir.

Q. Did you measure the contents of the barrel?

A. Yes.

Q. And was a gage used for that purpose?

A. Yes, sir.

Q. Could you tell how much oil had been used?

A. There was just—it gaged 37 gallons, and our ticket showed 38 had been put in it.

Q. There had been about a gallon of oil consumed? A. Yes.

Q. It had not been burned in the fire. In other words, the oil in the barrel did not become ignited?

A. No, sir; no not to my—it showed no evidence of it.

Q. Did you or your employees have anything to do with the construction of the platform on which the oil barrel was placed?

(Testimony of Sam Galbreath.)

A. I don't know whether this boy helped to fill that or not. I haven't that information.

Q. There was no order placed for the building of that platform with you, was there? A. No.

Q. You gave no instructions concerning the building of the platform? A. No.

Q. Now, did you instruct your employees or any person employed by you to install the stove or the chimney or any parts of the stove? A. No.

Q. Had you ever sold any stoves previously to Mr. Little? A. Yes.

Q. Either for himself or for his employers?

A. Yes.

Q. Did you ever install any of those stoves?

A. Not recently. That dates back quite some time. It is possible I did in Grass Valley when he was in business there. I don't recall, and I didn't look at any record on it whether there was an installation made there or not.

Q. You sold him his stove on the 10th day of October, 1946? A. No, we didn't install that.

Q. You didn't install that? A. No.

Mr. Desmond: That is all.

### Cross-Examination

By Mr. Castro:

Q. Now, what were the duties of this man Lemos with your company? A. Driving a fuel truck.

Q. What kind of a truck did he take over to the Herold Lumber Company that afternoon?

(Testimony of Sam Galbreath.)

A. One ton pickup.

Q. Did it have fuel in it? I mean oil petroleum.

A. Yes, stove oil.

Q. Did he take anything else with him?

A. A barrel and a valve, tubing, and connections.

Q. And where did he get the measurements for the tubing?

A. Well, it comes in rolls and he took a roll that comes, twenty-five feet and fifty feet, rolled.

Q. So you had some measurements before he took the roll over and unrolled it, is that correct?

A. No, it comes in standard rolls; and if he took a full roll of it, it would be either 25 or 50 feet——

Q. In other words——

A. (Continuing) ——that particular size.

Q. Your invoice shows "Tubing, 23 feet."

A. Uh-huh.

Q. Now, was that measured off at the time at your plant and cut and taken over then to the Herold plant?      A. No.

Q. He took a roll over there and took 23 feet off of it?      A. Yes.

Q. Now, what size oil drum did you have?

A. 55 gallon. [85]

Q. You are sure it isn't a hundred gallon oil drum?      A. Positive.

Q. Do you remember being present on or about the 28th day of August, 1947, at a conversation at your place of business between Mr. John L. O'Malley who is seated in the court room back there?

(Testimony of Sam Galbreath.)

A. Yes.

Q. And Mr. Ralph Gregory—do you remember being present at the conversation between the three of you?      A. Yes.

Q. At that time, didn't you and Mr. Gregory inform Mr. O'Malley that there was a hundred gallon tank?      A. No, sir.

Q. Now, what are Harry Gregory's duties at your place of business?      A. Driver—

Q. Anything else?

A. (Continuing) ——of a tank truck.

Q. Anything else?

A. Oh, yes; he does general work that you have for a man distributing petroleum products.

Q. Did he do anything about the installation of stoves?      A. Yes, sir.

Q. In fact, that is his job there too, isn't it?

A. Partly. [86]

Q. Now, do you know how he happened to go to the Herold Lumber Company on the afternoon of the fire?

A. No, I don't. I believe he did have orders. He picked up orders to give to this other man for delivery at Newcastle.

Q. What did he have to deliver to Newcastle?

A. I don't recall—that stove oil—whether it was stove oil or gasoline. The boy had to come back to the plant then and load up.

Q. Did the boy come back to the plant then and load up?      A. Huh?

(Testimony of Sam Galbreath.)

Q. Was Lemos there at the time the fire started at the Herold plant?      A. No.

Q. He was where?      A. Newcastle.

Q. You are sure of that?      A. Positive.

Q. What time did he leave for Newcastle?

A. Oh, I don't know the exact time. I imagine it was 3:00 or 4:00.

Q. Did you see him when he left for Newcastle?

A. I saw him loading at the plant.

Q. What time was he loading?

A. Well, I don't know that exact time either, but it is only [87] a few hundred feet from where he loaded across the tracks. I would say it would be 400 feet, and he went over there to load, to fill these orders and I saw it pull out of the plant.

Q. Now that oil drum or oil container which Lemos moved over to the Herold Lumber Company, was that full or empty at the time it was taken over?

A. Empty at the time it was taken over.

Q. And did you know when it was filled?

A. After it was put on the stand, but I don't know the time.

Q. Now who had the fuel truck at the time the tank was taken over to Herold's place?

A. Lemos had it.

Q. You are sure Gregory didn't have it?

A. I have three fuel trucks and Gregory was out on the route with one of the others, but this particular truck the boy used that all day.

Q. You don't dispute the fact that it was your

(Testimony of Sam Galbreath.)

truck sitting outside of the Herold Lumber Company building at the time of the fire?

A. Well, I wasn't there. I don't know.

Q. When you came up to the fire was your truck still there?      A. No.

Q. No truck of yours there?      A. No. [88]

Q. Was Gregory there?

A. I can't state whether he was there or not.

Mr. Castro: That is all.

Mr. Desmond: That is all.

(Witness excused.)

Mr. Desmond: Call Mr. Cerino Lemos.

### CERINO LEMOS

called for the defendants, sworn.

#### Direct Examination

By Mr. Desmond:

Q. Your name is Cerino Lemos?

A. Yes, sir.

Q. Where do you reside, Mr. Lemos?

A. I reside in Auburn, Placer County, California.

Q. What is your occupation?

A. Right now, I am a hospital attendant, DeWitt State Hospital.

Q. What was your occupation on October 31st, 1946?

A. Well, I was a truck driver for Mr. Sam Galbreath?

(Testimony of Cerino Lemos.)

Q. You were employed by Mr. Gailbreath in his plant at Auburn?      A. Yes, sir.

Q. Now, do you recall the day of October 31, 1946?

A. Well—on that day, Mr. Sam Gailbreath ordered me to go over to this lumberyard—oh, I don't know, I will say midday. I am not sure of the time—to take over oil, a drum, and some fittings—I guess copper tubing, and with instructions [89] that they were——

Mr. Castro: There have been no questions to him on that, your Honor.

The Court: I didn't think there was any question to him as to what the instructions were.

Mr. Desmond: Would you read the question?

(The question was read by the reporter.)

The Court: What did he tell you, that's all.

A. He asked me if I remember what took place on December——

The Court: Go ahead and tell what your employer told you.

A. Where—well, I am sorry, sir. He asked me with instructions to take the drum, stove oil, the fittings and copper tubing, and that they were the ones going to do the installation. They were just going to put up the oil—and go about my business.

Q. (By Mr. Desmond): Did you take that material to the plant of the Harold Lumber Company?

A. Yes, sir.

Q. And when you arrived, was the frame ready?



(Testimony of Cerino Lemos.)

A. No, sir, it wasn't ready, and it wasn't ready for quite a while.

Q. That's the frame that is located on the west-erly side of the office at this point where it is marked on this diagram, is that correct? (Indi-cating.)

A. Right, sir. [90]

Q. Now was someone building that frame?

A. Yes, there were some carpenters. Who they were, I don't know.

Q. And what did you do?

A. I just waited around until I got kind of tired.

Q. How long do you think you waited for them to finish the frame?

A. Well, that's all a matter of a guess now. I don't know for sure, but I will say about forty-five minutes or possibly an hour, I don't know.

Q. Now did you do anything in the meantime?

A. Yes. I crawled underneath and got the copper tubing from underneath the building while they are—that was waiting while they are building their platform for the drum.

Q. You laid out the copper tubing under the building?

A. Yes, sir.

Q. And then what did you do next?

A. I remember going back into the office and asked one of the carpenters where the two by fours run underneath the floor, where they nailed the floor, so he went in, made a start from the corner of the wall and we just measured where the two by

(Testimony of Cerino Lemos.)

fours would be, so he went ahead and drilled the hole.

Q. Drilled the hole. Now what did you do next?

A. Well, I went back outside as far as I can remember, and they weren't quite completed with their stand, so I decided [91] to go underneath and poke the copper tubing up through the floor and then one of the workers in there says, "Give me a little bit more." I evidently didn't give him enough copper tubing, so he was saying, "Give me a little bit more."

Mr. Castro: Now wait. May we have that man identified, otherwise it is hearsay.

Q. (By Mr. Desmond): Do you know who that man was? A. No, sir.

Mr. Castro: I move to strike out the hearsay, your Honor.

Q. (By Mr. Desmond): When you went in the office, did you see this stove?

A. Yes, sir; uh-huh.

Q. Where was the stove?

A. Well, the best to my notion it was just about where he was, I guess.

Q. Some place over on the easterly side of the office toward the north of the building, is that right?

A. Uh-huh.

Q. And was any—were there any workmen around there? A. Lots of them.

Q. Lots of them. Do you know who they were?

A. Not a one.

(Testimony of Cerino Lemos.)

Q. You don't know them by name?

A. Don't know them by even to look at them.

Q. Were there any painters there? [92]

A. Yes, sir; there were painters there.

Q. And what were they doing?

A. Well, I don't know, but they were painting the walls, varnishing or waxing something, but they had a paint brush; in fact, I think there were two of them.

Q. Were they painting the floor?

A. Well, the best I can remember, they were painting the walls.

Q. I see; and did they have any canvas or anything on there?

A. Yes, they had a piece—well, I will say a paper on the floor so, I guess, they wouldn't get the floor dirty, I imagine.

Q. I see. Now, did you—you heard the voices up there. You don't know who it was that was speaking, do you?      A. No, sir.

Q. And you pushed the copper tubing up?

A. Yes, sir.

Q. Now what did you do after that, Mr. Lemos?

A. Well, after I pulled the copper tubing out and got out from underneath the building—oh, I'll say in about ten or fifteen minutes, the stand was made and I had thrown the drum up on top of the stand, which was empty, and——

Q. You mean the drum was empty?

A. Yes, sir; and so I put on a valve. While I

(Testimony of Cerino Lemos.)

was out there I decided, well, that is, they bought the stove and what not to give them service, so I hook up the tank and I filled it up. [93]

Q. You hooked the copper tubing to the tank?

A. Yes, sir; all that same instant.

Q. And then you filled the tank up?

A. Yes, sir.

Q. And, now, do you recall how much oil you put in the tank?

A. Yes, sir. I have heard it was something like thirty-eight gallons. If I heard it this morning, I don't know.

Q. At the time you delivered the copper tubing, fittings, valves, bushings, drum and stove oil—thirty-eight gallons of oil—did you make out an invoice?

A. (Pause.)

Q. Let me show you Plaintiffs' Exhibit 3 and ask you if you made out that invoice?

A. Well, I made out this tag.

Q. Do you recall when you made it?

A. Well, I made it that day. That's my signature on the bottom there.

Q. Your initials C. L.?           A. Yes, sir.

Q. That's all of the material that was delivered there?           A. Yes, sir.

Q. Was there any charge made for any installations?           A. No, sir.

Q. Or any labor in connection with installation?

A. No, sir. [94]

(Testimony of Cerino Lemos.)

Q. Now, after you made this connection, at the barrel, what did you do next?

A. I filled the barrel up.

Q. Did you return to the inside, to the office?

A. After I half filled the barrel, yes, sir, I did go back into the office.

Q. Did you see any workmen there?

A. Yes, there was one particular. He was putting up this chimney. I asked him if he was having difficulties in putting the chimney pipe or the stovepipe through the wall. He has to head up this chimney stack or something. I didn't pay much attention because my instructions was to put the drum down there and fill it up, not to install it.

Q. In other words, these workmen were installing the pipe, the stovepipe which led from the stove to the flues?      A. Yes, sir.

Mr. Castro: He said one workman. I didn't understand him to say more than one.

Q. (By Mr. Desmond): How many workmen were there, Mr. Lemos?

A. Well, if you want to be identical about it, I would say there were about two painters. This boy particularly was working on this stovepipe. That makes a total of three. And probably one of the light men, and that makes about five, guys in the middle office, so it would make about a total of seven men now. I don't know for sure and who was doing what. [95]

(Testimony of Cerino Lemos.)

Q. Now do you recall which one of these men was installing that stovepipe leading to the flue?

A. Well, I didn't quite get your question.

Q. Could you identify the man that was installing the stovepipe that was leading up to the flue?

A. No, sir.

Q. Now, could you describe—tell us how close this stove was to the wall of the office?

A. Well, that's going to be a guess. I will say in the neighborhood of eighteen inches.

Q. I see. A. Just a guess.

Q. Did you see—did you see the position of this man that was installing the stovepipe?

A. Yes, sir; he had his legs—

Q. Can you tell us just what his position was?

A. By standing up?

Q. Yes.

A. Well, he had his legs more kind of apart like this and trying to put the stovepipe in through the wall. (Indicating.)

Q. I see. Was he behind the stove between the wall and the stove?

A. Well, one leg was behind the stove. I will say maybe half his body was, one leg cocked over the copper tubing, and outside where he had his legs stretched out apart quite well. [96]

Q. Now, can you describe, Mr. Lemos, the type of connection—withdraw and strike. Can you tell us where the copper tubing that comes from the barrel is hooked on to the stove?

(Testimony of Cerino Lemos.)

A. Where it is hooked onto the stove?

Q. Yes.

A. Well, I say hooked on to the carburetor.

Q. I see; and from there it goes in the carburetor?

A. Into the carburetor and up into the——

Q. Now when you returned at that time, when you saw them putting up the stovepipe, did you notice that carburetor?

A. No, I just noticed it was hooked up so I never checked it very closely. I just didn't notice.

Q. In other words, Mr. Lemos, the copper tubing running from the oil barrel outside was hooked on to the connection on the carburetor?      A. Yes.

The Court: You didn't do that?

A. No, sir.

Q. (By Mr. Desmond): Now, you didn't make that connection and you didn't put up any of the stovepipe leading to the flue, is that right?

A. No, sir; I never touched anything except like the stove in the office. That's the only thing I done.

Q. All right now, what did you do at that time?

A. Well, when they had the stovepipe all up in the air—I mean [97] it was in the place, I went back outside and I turned on the valve.

Q. That is the valve leading from the oil barrel?

A. Yes, sir; uh-huh, and well, I probably waited mainly say a minute or two until the oil came into the stove and I lit a match—lit a stove rather.

Q. You lit the stove?      A. Yes, sir.

(Testimony of Cerino Lemos.)

Q. And did the stove burn?

A. Yes, sir; uh-huh.

Q. Did it burn properly?

A. To my *emotion*, yes.

Q. How long then after you lit the fire did you remain there?

A. Oh, I guess about five minutes, I guess—somewhere in the neighborhood, maybe ten; I don't know, I don't think much more.

Q. What happened next?

A. Harry Gregory came up to the lumber yard and asked and told me there were two customers down at Newcastle that wanted fuel, so he told me to leave so I just practically left that instant, back to the plant to load up the truck and go down to Newcastle and San Francisco, those two customers.

Q. I see, and at the time you left, was the fire burning properly in the stove?

A. Yes, at the time I left; yes, sir.

Mr. Desmond: That is all, your Honor. Just a moment—[98]

Q. Now, were you the only person in that lumber yard or in that office and about those premises during the time that you have described that was an employee of Sam Gailbreath?

A. I don't quite get it.

Q. All right. During the time that you arrived there to deliver the oil, were you the only employee, were you the only person there who was an employee of Sam Gailbreath?



(Testimony of Cerino Lemos.)

A. Yes, I was the only one until about five minutes and Harry Gregory was with me—maybe not that long, maybe three minutes, I just left instantly.

Q. Did the carpenter or whoever drilled that hole, was he an employee of Mr. Gailbreath?

A. No, he wasn't. I was the only one there, sir.

Q. All right now. Was the man that you saw putting the chimney up, going up from the stove to the flue, is he an employee of Mr. Gailbreath?

A. No, sir.

Q. Did you see any employees of Mr. Gailbreath do any work around or about that stove other than yourself?

A. No, I never did.

Q. And during all this time the painters were applying this paint, whatever it was?

A. Whatever it was; yes, sir.

Mr. Desmond: That is all. [99]

### Cross-Examination

By Mr. Castro:

Q. How old are you?

A. I am twenty-six.

Q. How long did you work for Mr. Gailbreath?

A. Oh, I will say three months, maybe not quite, maybe two and a half months or three.

Q. Was that before or after the fire?

A. Well, I started before and I quit after.

Q. How long after?

A. Month and a half, I don't know.

Q. Now this hole that was drilled—

A. Uh-uh.

(Testimony of Cerino Lemos.)

Q. —did you ask the carpenter to drill it?

A. I asked him where these two by fours run underneath the floors—flooring. He went and drilled it.

Q. You didn't tell him to?           A. No, sir.

Q. Didn't indicate to him you wanted to put tubing through that?

The Court: What is that? I didn't quite get that. You wanted to put tubing through the hole for him to drill?

A. That I don't know. I went back underneath. I hooked it all through, so I did it on my own accord.

Q. (By Mr. Castro): Now did you talk to anybody out there about poking tubing through and that you were going to poke it through and for them to take it as it came through? [100]

A. No, I don't remember talking to anybody. I remember saying—someone up on top saying, "Give me a little bit more."

Q. What did that man look like?

A. Gentlemen, I don't know.

Q. Did you see him?

A. Sure I seen him but I don't know what he looks like today.

Q. Know his name?           A. No, sir.

Q. Do you know how he was dressed?

A. Looked like he was dressed in—I don't know. He just had clothes on. I don't remember, sir. I really don't know how he was dressed.

(Testimony of Cerino Lemos.)

Q. A young man or an old man?

A. Gentlemen, I lost the picture of his face entirely.

Q. Was he a heavysset man or a slender man?

A. I still don't know. I can't—I really don't know.

Q. A tall man or a short man?

A. I don't know, sir.

Q. Now were you there at the time the fire started?      A. No, sir.

Q. Were you over at the Gailbreath plant at the time the fire started?      A. No, sir.

Q. Did you see the fire at all?      A. No, sir.

Q. Now, isn't it a fact that when Harry Gailbreath came there he had to reconnect this tubing and so-called carburetor that you have referred to?

A. I don't know. I never seen Harry touch the stove at all. Of course, I was there with him just a matter of two or three minutes, or five minutes.

Q. Isn't it a fact that Harry Gregory was there for about two and a half to three hours before the fire?

A. Well, that I don't know. I don't just—I don't know whether he, when the fire started, took off or anything.

The Court: What time did you leave?

A. Well, I'd say it was a little after four in the afternoon to go to Newcastle and deliver my two deliveries.

(Testimony of Cerino Lemos.)

Q. (By Mr. Castro): And what time did you get there? A. Pardon?

Q. What time did you reach there?

A. Newcastle?

Q. No, Harold Lumber Company. What time did you arrive at Harold Lumber Company?

A. Oh, God I don't know. You mean in the morning? I didn't quite understand your question.

Q. What time did you get to Harold Lumber Company that day?

A. I don't know; just right after lunch.

Q. You were there from that time until four o'clock?

A. Yes, something in the neighborhood. [102]

Q. Harry Gregory was not there during any of that time?

A. He was now—well, see, I don't know exactly the time I left but he was there, well say about three minutes before I left, so I got there maybe a little after four, I don't know.

Q. Have you ever installed a heater of this type?

A. Yes, I installed one over at, well, call it the Indian Wolf Routings.

Q. Was that before or after this fire?

A. Before.

Q. How long before?

A. Oh, God I don't know; maybe two weeks, three weeks.

Q. Did you have Harry Gregory help you on that job?

(Testimony of Cerino Lemos.)

A. No, sir; he never was around.

Q. Do you know the size tank that was set up on that stand outside the building?

A. Yes, it was one of those 53 or 55 gallon tanks—one of those little tanks.

Mr. Castro: No further questions.

Mr. Desmond: Mr. Lemos, do you recall——

Mr. Castro: May I ask one or two further questions if you don't mind?

Mr. Desmond: Go ahead.

Q. (By Mr. Castro): Now that man that you claimed worked on the chimney or the stovepipe, can you describe him?      A. No, sir. [103]

Q. What he looked like?

A. I don't know, sir.

Q. Whether he was an old man or a young man?

A. I can't sir. I don't know the picture of the character.

Q. Whether he was dressed in any particular way?

A. Well, I don't know. I don't know. I am not going to say something I am not sure.

Q. Who was in there at the time he was fixing the so-called chimney?      A. Pardon?

Q. Who was in there at the time he was fixing the so-called chimney setup?

A. Oh, I don't know, was around five or six guys, a lot of people around.

Q. Name them.

A. I don't know any of them, sir.

(Testimony of Cerino Lemos.)

Q. Was Jack Little there?

A. I don't know him either.

Q. Did you see either one of those gentlemen that are identified as Charley or Jack?

A. They possibly was there but I don't know.

Q. Did you see them?

A. If I did, I know I didn't know who they were.

Q. You say there were two men painting?

A. Yes. [104]

Q. What did they look like?

A. I don't know—looked like men to me.

Q. Old or young men?

A. I don't now, I can't—

Q. Can you describe their physical shape in any way? Were they tall or short, heavy or slim?

A. They were just men. That's all I know. I never paid any attention to them.

Q. Did you hear any names?

A. No, sir; I don't know.

Mr. Castro: No further questions.

#### Redirect Examination

By Mr. Desmond:

Q. Do you know a man by the name of Glenn Carns?      A. No, sir.

Q. Now, do you recall that night what time you returned from Newcastle making those deliveries?

A. I would say between 6:15 and 6:30. I don't know for sure but it was after 6:00.

Q. And that was after the fire?

(Testimony of Cerino Lemos.)

A. Yes, sir; uh-huh.

Q. And you left there when Mr. Gregory gave you these instructions to make the delivery to Newcastle—it was around 4:00 o'clock?

A. Well, a little after four maybe, around four like. [105]

Q. And where did you go then?

A. I went back up to the plant and loaded up, sir.

Q. Do you know what you loaded your truck with?

A. Stove oil if I recall myself correctly what I loaded up with—stove oil for the both customers.

A. And, do you know how many gallons you put in?

A. I think I put a full tank, three-hundred and—I don't know how much the tank holds, some three-hundred gallons, I guess.

Q. Then you drove that truck and loaded fuel oil down to Newcastle?      A. Yes, sir.

Q. And that is how far from Auburn?

A. I don't know. Three miles, I guess—three and a half, four, I don't know.

Q. You made the deliveries there?

A. Yes, sir.

Q. How many deliveries did you make?

A. Two, sir.

Q. And then you returned to Auburn?

A. Yes, sir.

Mr. Desmond: I think that is all.

Mr. Castro: No further questions.

The Court: That is all.

Mr. Desmond: Call Lars Wold, your Honor.

### LARS WOLD

Called for the defendants, sworn.

#### Direct Examination

By Mr. Desmond:

Q. Your name is Lars Wold?

A. Yes, sir.

Q. Where do you live, Mr. Wold?

A. Auburn.

Q. What is your work? A. Contractor.

Q. Contracting builder? A. Yes, sir.

Q. How long have you been engaged in that business? A. About two and a half years.

Q. And did you construct the building that has been referred to as the office and lumber yard of the Harold Lumber Company in Auburn?

A. Yes, sir.

Q. And you were the contractor on the job?

A. It was a percentage job.

Q. Now, did you employ any painters around the place? A. No, sir.

Q. Who employed the painters?

A. Charley Little.

Q. Charley Little? A. Yes, sir. [107]

Q. Do you recall the day of October 31, 1946, day of the fire? A. The day of the fire?

Q. Were you about the premises on that day?



(Testimony of Lars Wold.)

A. I was there in the afternoon and after the fire started.

Q. You were there in the afternoon after the fire started?      A. Yes, sir.

Q. Now, did you have occasion to go into the office that day?

A. I went through the office.

Q. Were there any painters working there?

A. Yes, sir.

Q. Were they your employees?

A. No, sir.

Q. Whose?

A. They were Mr. Little's employees. Well, Charley said they were a couple of Okies, that's the expression.

Q. And that was about what time in the afternoon?

A. I would say around—oh, between one and two, I am not positive.

Q. Do you know what they were doing?

A. Sir? They were painting, but I am not sure.

Q. Do you know what sort of paint they were using?      A. Standard Oil hardener.

Q. Where were they applying it?

A. Where? [108]

Q. To what part of the office were they applying it?

A. I am not sure. I think it was the walls. He had the floor all painted in.

Q. What do you recall about the floor?

(Testimony of Lars Wold.)

A. He had boards. We had to walk on boards there so we wouldn't take the stuff up.

Q. So you wouldn't track the paint?

A. Yes, sir.

Q. And the paint on the floor was wet, was it?

A. Yes, sir.

Q. And the paint on the walls was fresh and wet?

A. It was applied within that day or the day before.

Q. Now, do you what—do you know anything about this material Standard Oil floor hardener?

A. It's inflammable.

Mr. Castro: We object now to the question on the ground that no proper foundation was laid, your Honor, as to this man's qualifications as to this material.

The Court: Sustained.

Q. (By Mr. Desmond): Have you had considerable experience with paints and varnish?

A. Not so much. I always hire painters for that.

Q. Are you familiar with this particular material?      A. Not too much.

Q. I see. All right. Now, Mr. Wold, did you install the flue? [109]      A. Yes, sir.

Q. Will you describe to the Court, please, what that flue is and where it was in connection with the building?

A. It had a terracotta lining. We had aluminum

(Testimony of Lars Wold.)

casing on it because we couldn't get the metal. The metal was hard to get and we had aluminum casing on it but it is a patent flue. It passes inspection.

Q. Now that flue, where did it begin with reference to the building?

A. I would say, well, twelve inches at the top and, the hole was twelve inches from the ceiling. That's the least we can get by with and we couldn't get it lower, we didn't want to bump heads.

Q. In other words, the outlets from the stove were——

A. The top of the outlet was twelve inches from the ceiling.

Q. It was up close to the ceiling, in other words?

A. Yes.

Q. And was there—did that flue extend through the wall?      A. Through the wall.

Q. Then where did it go?

A. Up through the roof.

Q. Up through the roof?

A. Yes, it comes into a "T" and goes up through the roof.

Q. Did you have a permit for installing that flue?      A. Yes, sir. [110]

Q. Now, did you see the stove to which reference has been made?

A. I seen the stove that afternoon when I went through.

Q. And, will you tell us, please, how close the stove and the pipe heading of it was from the wall?

(Testimony of Lars Wold.)

A. Well, I would say it was between twelve and twenty-four inches.

Q. And was that an open pipe leading from the stove to the flue?      A. I didn't notice no pipe.

Q. I see.

Mr. Desmond: That's all. Oh, one further question, your Honor. You may rule me out of order but may I ask the question?

Q. Did you have a permit for the construction of this building?      A. Yes, sir.

Q. What was it—what value was the permit granted?

Mr. Castro: Objected to on the ground that it is irrelevant, incompetent and immaterial.

The Court: Sustained.

Mr. Desmond: That is all.

The Court: Do you know who connected this stove up, the flue?      A. No, I do not.

The Court: Did you give any direction to any of your men to do it? [111]

A. No, I had nothing to do with installing stoves.

The Court: As far as you know, none of your employees did it?

A. No, sir. They have orders not to touch anything in that.

#### Cross-Examination

By Mr. Castro:

Q. Now what time of the day did you get there on the date of the fire?

A. I will say between twelve and one, around

(Testimony of Lars Wold.)

between twelve and one. I am not exactly sure of that.

Q. Did you see this Mr. Lemos there?

A. I seen a fellow that looked like him. I am pretty sure it was him.

Q. Where did you see him? A. Sir?

Q. Where did you see him?

A. He was right in the office at the time.

Q. What was he doing?

A. I don't know. He wasn't doing anything when I passed through there.

Q. Did you see him doing anything with tubing?

A. With what?

Q. With tubing.

A. No, he was installing tubing but I didn't see him doing it.

Q. You say you know he was installing it but you didn't see him doing it? [112]

A. The thing was underneath the building there.

The Court: How about up in the office, was he installing any tubing up there in the office?

A. Well, it came through the floor.

The Court: Was he up in the office?

A. He was in the office, yes, sir.

The Court: He was?

A. He was in the office.

The Court: Did you see him with the tubing while he was in the office?

A. Well, I didn't see him working on it.

Q. (By Mr. Castro): Did you see him doing

(Testimony of Lars Wold.)

anything with the stove while you were in the office?

A. No, I wouldn't see that. Didn't see him doing anything with the stove.

Q. Who else was in the office at that time?

A. I don't remember anybody being there except the painters. They were working in there.

Q. What were their names?

A. I don't know them.

Q. Do you know a man by the name of James France?

A. I don't know their names. I had nothing to do with them. They were hired by Charley Little.

Q. Now, had they painted in the office previous to the day of the fire? [113]

A. The day before and that same day.

Q. Do you know what they painted the day before?

A. Painted the walls and the floor, the ceilings and the floor. They were very near through that day if I remember right on that, but I know they were still painting the two days.

Q. Do you know where about in the room they were painting when you were there between one and two o'clock?      A. No.

Q. Do you know whether the counter was in the room?      A. Yes, sir.

Q. And do you know whether they were painting between the counter and the side of the building?

A. I don't believe they were, because——

Q. Do you know?      A. I don't believe so.

(Testimony of Lars Wold.)

Q. Do you know whether they were painting the front portion of the counter?

A. They were painting on the counter and they painted that day because we hadn't had it finished that day before, so I know they had to paint the counter that day.

Q. But the day before, you think they painted the walls and the ceilings?

A. The boards, you say?

Q. The walls and the ceilings.

A. The walls. [114]

Q. And the floor?

A. And the floor. Everything had that Standard Oil hardener on it.

Q. Did you help them move the desk in?

A. No, it was built right there.

Q. You say the desks were moved in?

A. No.

Q. Were the desks built into the floor?

A. We built the counter but the desk was moved in. They were oak desks, I think.

Q. Did you see any paper covering on the floor?

A. I don't remember paper but I know we walked on boards.

Q. Well, the floor was made out of boards?

A. Yes, the floor was made out of boarding, one by twelve, so we wouldn't track dirt on the things.

Q. Now, did you feel the floor hardener to see whether it was dry yet?

A. No, I didn't.

Q. Do you know whether it was dry or wet?

(Testimony of Lars Wold.)

A. I know it was wet because they were just applying it.

Q. You told me they painted the floor the day before.

A. I don't know anything about the floor. I didn't try it then.

Q. Do you know whether it was dry or wet?

A. It takes twenty-four hours for that stuff to dry. [115]

Q. Do you know what time they finished painting the floor the day before?

A. No, I had nothing to do with painters.

Q. Do you know whether they painted the ceiling or the floor first?

A. They did the ceiling and the floor. I don't know which one they painted first.

Q. Now this flue that was put in—you got a permit for it?      A. Yes, sir.

Q. Did you get a permit to put in the stove?

A. I had nothing to do with the stove.

Q. Was the flue put in in proper condition?

A. Yes, sir. It was installed and passed.

Q. Passed by the inspector?      A. Yes, sir.

Mr. Castro: No further questions.

Mr. Desmond: That is all, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Miller: Mr. Gregory, will you take the stand and be sworn?



If your Honor please, may I ask at this time that Mr. Wold be excused, unless counsel has anything further?

Mr. Castro: We have nothing further.

The Court: All right. [116]

HARRY L. GREGORY

Called for the Defendants, sworn.

The Clerk: And your full name, sir?

A. Harry Lesly Gregory.

The Clerk: Will you take the stand, please?

Direct Examination

By Mr. Miller:

Q. Your name is Harry Gregory?

A. Yes.

Q. And, Mr. Gregory, where do you live?

A. Auburn.

Q. How long have you lived at Auburn?

A. About eleven years.

Q. By the way, calling your attention to October 31, 1947—

The Court: '46.

Mr. Miller (Continuing): —'46, that's right—pardon me—who were you employed by at that time? A. Mr. Galbreath.

Q. Mr. Galbreath? A. Yes.

Q. And that's Sam Galbreath, is that correct?

A. That's right.

Q. Now were you working at the plant he operated, the Signal Oil Plant on that day? [117]

(Testimony of Harry L. Gregory.)

A. Yes, sir.

Q. Working in and out of there, is that correct?

A. Uh-huh, that's right.

Q. And for the purpose of the record, you had worked for Mr. Galbreath before that time, hadn't you, before that day?      A. Yes.

Q. About how long, do you know?

A. I have worked for Mr. Galbreath for about four and a half years, about that.

Q. Uh-huh.      A. Four or four and a half.

Q. Now, on the day in question, October 31, 1946, and calling your attention specifically to the afternoon of that day, did you have an occasion to go over to the Herold Lumber Company?

A. Well, I was coming in from making some deliveries and I knew about these other deliveries, so I stopped and told Mr. Lemos to go out and make the deliveries and——

The Court: What time of the afternoon was that?

A. Well, I couldn't say just exactly what time it was.

Q. About?

A. Well, I imagine it was around two or three o'clock.

The Court: Proceed.

Q. (By Mr. Miller): Was it after—well, all right. Now, did you say you told Mr. Lemos something? [118]

A. Yeah.

(Testimony of Harry L. Gregory.)

Q. What did you tell Mr. Lemós?

Mr. Castro: Objected to as hearsay.

Mr. Miller: All right.

Q. Where did you first see Mr. Lemos when you went to the plant?      A. I didn't go to the plant.

Q. Well, I mean to the Herold Lumber Company, where did you first see him when you stopped there? Do you recall where he was with respect to the building?

A. I think he was just outside of the door and—no, he was inside; that was it.

Q. He was inside the building proper?

A. Yes.

Q. What—strike and withdraw. Did you stop in front of the building at the Herold Lumber Company?

A. Just up the road on the right-hand side.

Q. Did you go in the building?

A. Yeah, I went in the building.

Q. Then you saw Mr. Lemos, is that right?

A. That's right.

Q. What was he doing?

A. Well, they were getting ready to light the stove.

Q. Did he light the stove or—      A. Yes.

Q. Were you there?

A. Yes, I was there. It was just lit just as I came in.

Q. It was lit as you came in?

A. That's right.

(Testimony of Harry L. Gregory.)

Q. Did you light the stove or have anything to do with the lighting of it?      A. No, sir.

Q. You are sure of that are you?

A. I am sure of that.

Q. All right, was the stove burning?

A. It was burning, yes.

Q. Was it burning when you first looked at it?

A. Yes.

Q. All right, now, did Mr. Lemos stay there, or what happened?

A. No, he left in about, oh, I imagine about five minutes.

Q. In about five minutes?      A. Yes.

Q. Now, calling your attention to the time you first came in the room or the office of the lumber company and when you state you noticed the stove was burning, and from the time Mr. Lemos left, or whatever space of time that was, was the stove burning during that period?      A. Yes, sir.

Q. Was it burning normally or naturally?

A. Yes, it was burning all right. [120]

Q. Uh-huh. Now, did you have a conversation with Lemos before he left?

A. No only just that I told him that there was some deliveries to be made.

Q. Uh-huh. Then he left, is that it?

A. Yes, that's right.

Q. Now, after he left, did you stay there a little while?      A. Oh, about a half hour.

Q. About half an hour?

(Testimony of Harry L. Gregory.)

A. It might have been a little longer.

Q. Pardon me, I thought you had finished your answer.

A. Yeah.

Q. Then, where did you stay, inside the office of the lumber company or outside?

A. I stayed around there for quite a little while, yes, and——

Q. Well, now, did a fire occur?           A. Yes.

Q. What first called your attention to a fire?

A. Well, I was standing by the door when the fire took place.

Q. By what door were you standing——

A. Well——

Q. ——with respect to the front or the back or west, east, north or south?

A. There is only one door that I know of and that's on the [121] south side.

Q. South side?           A. Yes.

Q. This diagram, if you see what we have here. The top of the board is north. This is west, south and east. (Indicating). And you are referring to the door here by the south side?

The Court: That would be on the east side there.

Q. (By Mr. Miller): You said the north or south side?           A. Where you got your finger?

Q. Yes, down here. And were you standing at that door then when you first had it brought to your attention that there was a fire in the building?

A. Yes, that's right.

Q. Now, will you tell the Court what you first

(Testimony of Harry L. Gregory.)

observed, how you first knew that there was a fire; will you tell his Honor that?

A. Well, I was standing there at the door and I happened to look back and the fire was going up the wall. That's about all I could tell you, but I saw it.

Q. Did someone call it to your attention or holler, or did you observe it yourself?

A. No, I just happened to turn around and I saw the fire.

Q. All right, now, it was burning on the wall, is that your testimony? [122]

A. That's right.

Q. What wall would that be, the one near the stove or the other one?

A. In back of the stove, above the stove is where I saw the fire.

Q. You saw the fire burning back and above the stove, is that right?      A. That's right.

Q. Was anybody else in the building at that moment that you recall?

A. There was some fellows in there. I don't know who they were. I never saw the men before.

Q. Were they in the building itself?

A. Yeah, they were in there, yeah.

Q. What did you do after you saw the fire on the wall?

A. There was a coat on the bench there, on that counter, and I naturally was going to try to save something if I could, and I grabbed for the stove

(Testimony of Harry L. Gregory.)

and it tilted over a little bit but it was so hot on the back of it that I couldn't stand it. I had to get out of there.

Q. Then did you leave the building?

A. Yeah.

Q. Where was the fire burning then?

A. It was all up over the top of the ceiling and down it went right on over and down. [123]

Q. Now, when you first looked back and saw the fire, when you first noticed the fire, you said it was burning on the wall, is that correct?

A. That's right.

Q. Was the floor on fire then at the time——

A. No, sir.

Q. ——you first saw it?           A. No, sir.

Q. One thing we overlooked: From the time you first arrived there up until the time you left, did you do anything towards installing the stove or adjusting it?           A. No, sir.

Mr. Miller: That's all.

Mr. Castro: Just a moment, please, counsel.

Q. (By Mr. Miller): Now, at any time with respect to this particular stove that was delivered by your employer Mr. Galbreath, did you have anything personally to do with the delivery of the stove, the repair, the installation of the stove itself, or anything connected with it, or the drum?

A. No, I didn't.

Q. (By the Court): And you didn't light it?

A. No. I didn't light it.

(Testimony of Harry L. Gregory.)

Cross-Examination

By Mr. Castro:

Q. You are still working for Galbreath?

A. Yes, sir. [124]

Q. What is your job?

A. Delivering stove oil and gasoline and installation work.

Q. Who installs stoves at Galbreath's?

A. I do mostly.

Q. Anybody else? Is there anybody else there installs for Galbreath?      A. No.

Q. Was there on the day of the fire?

A. No.

Q. Was Lemos learning how to install stoves at the time?

A. Well, he has already installed stoves before that.

Q. So he had installed stoves and you had installed stoves on the day of the fire?

A. That's right.

Q. Now, had he done anything to install this stove at the time you arrived at the Herold Lumber Company?      A. I don't know.

Q. What time did you get there?

A. Well, I don't know. It was around three o'clock, maybe a little later.

Q. How much?      A. I couldn't say exactly.

Q. Approximately?

A. Three thirty or four.

Q. And you remained there how long? [125]



(Testimony of Harry L. Gregory.)

A. About a half hour.

Q. What time did the fire take place?

A. Well, I couldn't tell you.

Q. (By the Court): What were you doing there that day at all?

A. Well, we sold the stove to these people and naturally I was just trying to be—to stay there and take care of things in case there was anything ever would happen to it.

Q. Were you apprehensive anything was going to happen to it?           A. No.

Q. Did you do anything in connection with it?

A. No, I didn't.

Q. You just stood there?

A. I just stayed there. That was all.

Q. (By Mr. Castro): Did you see Mr. Jack Little there, this gentleman that is seated back here?

Will you stand up?

(Mr. Jack Little stood up.)

A. I don't remember him, no.

Q. Was anybody in the room at the time the fire started except yourself?

A. There was some fellows there but I don't know them. I never saw the fellows before in my life.

Q. How many?

A. I don't know exactly just how many there was in there.

Q. How were they dressed? [126]

A. Well, work clothes, I imagine.

(Testimony of Harry L. Gregory.)

Q. (By the Court): Did you inspect it to see whether it was connected up properly?

A. No.

Q. I can't understand why you would be there just to see if anything happened. Did you inspect to see if it was all right?

A. I knew that Mr. Galbreath sold them the stove and I thought maybe I would just stay there until—and see if there was anything—if there was anything went wrong with the thing.

Q. But you didn't look—

A. I went around the stove, yes, but I didn't see anything wrong with it at all.

Q. (By Mr. Castro): Do you know what caused the fire? A. No, I don't.

Q. Now, *isn't a* fact that you had been there approximately two and a half to three hours at the time of the fire?

A. No, I couldn't have been there that long.

Q. Isn't it a fact that when you arrived there, Lemos had started connecting up that stove and you took it over from him?

A. No, I don't know anything about what Lemos done.

Q. Isn't it a fact that you took over and did it, reconnected it yourself? [127] A. No.

Q. Isn't it a fact that you smelled this new paint that was in the room?

A. There was paint over in there, yeah. It was just freshly painted.

(Testimony of Harry L. Gregory.)

Q. Do you usually light these stoves when you smell paint?

A. I don't know. That was the first time that I had ever had anything like that happen.

Q. Isn't it a fact that you don't put stoves in when there is fresh paint in a room?

A. Well, I don't know whether they do or not.

Q. Isn't it a fact that it has been the practice there not to put stoves in and light them in a room where there is fresh paint till that paint has dried out?

A. Well, that's the first time I have ever had anything like that happen.

Q. All right. Now, you say you did not light the stove?      A. No, I didn't.

Q. Isn't it a fact that you turned on the oil and let it run for a couple of seconds and then looked at it with your flashlight and then threw the lighted match in there?

A. No, I didn't do that.

Q. You didn't do that?      A. No.

Q. Are you sure you stayed there for a half hour, however? [128]      A. Just about a half hour.

Q. You did nothing?

A. I didn't do a thing, no.

Q. You did grab the stove, or the coat, some coat that you picked up?

A. There was a coat on the desk there.

Q. And then did you drop the stove?

A. I just turned loose of it.

(Testimony of Harry L. Gregory.)

Q. Did the stove turn over and the oil spill out?

A. I don't think it turned clear over. It was kind of leaning.

Q. Do you remember talking to Mr. John O'Malley?  
A. Yes, sir.

Q. Where did that conversation take place?

A. In front of my house.

Q. Who was present? A. Mr. Galbreath.

Q. And at that time, did Mr. O'Malley ask you whether you had connected this stove?

A. I think he did, yes.

Q. What did you tell him?

A. Well, I am not sure as to what I did tell him at the time.

Q. Isn't it a fact that you told him that the stove had been uncrated by some other person and someone had commenced to install it when you arrived there and that you completed the installation by setting it up properly, connecting the tubing from [129] the tank to the stove underneath the flooring, did you tell him that?

A. I don't know whether I told him that or not.

Q. Now, didn't you tell him that you had smelled the new paint in there at the time you did this installation?

A. Well, it smelled like there was new paint in there all right.

Q. Didn't you tell him where there was new paint you usually don't light the stove?

A. I don't remember telling him that.

(Testimony of Harry L. Gregory.)

Q. Now, didn't you tell him you were there about two and a half or three hours in the course of the installation of that stove?

A. No, I don't think I told him that at all.

Q. Isn't it a fact that you turned on the oil—you told him that you turned on the oil after the tubing and stove had been connected, and watched it flow for a couple of seconds and used a flashlight to look into the stove to see that the oil was in the pot?

A. I don't know what Mr. O'Malley wrote down there.

Q. I am asking you what you told him.

Mr. Miller: I object——

Mr. Castro: He has a right to answer the question.

The Court: That is not an answer to the question. The question: Did you tell him then or did you not? [130]

A. No, I didn't.

Q. (By Mr. Castro): And did you tell him you ignited that by throwing a lighted match?

A. No.

Q. And did you tell him you were the only employee of Galbreath on the premises?

A. No.

Mr. Miller: Just a moment, may I see that? May I see it, counsel?

Mr. Castro: Yes.

(Testimony of Harry L. Gregory.)

(Mr. Castro shows a two-page document to counsel.)

Mr. Castro: You can read it if you want to.

Q. At the time Mr. O'Malley talked to you, did he take any notes in writing? A. Yes, he did.

Q. Is that your signature? (Showing document to witness.) A. Yes, that's my signature.

Mr. Castro: May I have it marked, identified as plaintiffs' next in order?

The Clerk: Plaintiffs' 4 for identification.

Q. (By the Court): Was there any writing on the paper at the time you signed it?

A. It was on there, yes. I didn't read it over.

Mr. Miller: Let's see it again, will you, counsel?

(Mr. Castro shows document to Mr. Miller.)

Q. (By Mr. Castro): Also in pencil, here is the name Harry Gregory. Is that your writing?

A. No.

Q. Or is this printing on the front side yours?

A. No, I don't think so.

Mr. Castro: No further cross-examination.

Mr. Miller: That's all, your Honor.

The Court: All right, call the next one.

Mr. Miller: Call Mr. Galbreath.

SAM GALBREATH

Recalled by the defendants. Previously sworn.

Direct Examination

By Mr. Miller:

Q. Mr. Galbreath, how long have you been engaged in the business of selling this type of stove?

A. A little over ten years; between ten and twelve years.

Q. And have you installed a number of these stoves? A. Yes, many of them.

Q. And have you observed their operation?

A. Yes, sir.

Q. What sort of a flue is necessary? What sort of a pipe is necessary to go from the stove to the flue?

A. Ordinary stovepipe like that is commonly used.

Q. Is it necessary to have a damper?

A. Oh, yes. [132]

Q. Let me show you this piece of pipe and ask you if that is the type of pipe that extends from the stove toward the flue?

A. Yes, sir; uh-huh, there is many different ones, sir. However, that is one particular type.

Q. This is the ordinary—what would you call this, a tee? A. Yes, sir.

Q. Now at the bottom of this tee is a damper—

A. Uh-huh.

Q. (Continuing): —or a metal object that fits into the end of the pipe? A. Yeah.

(Testimony of Sam Galbreath.)

Q. And in the installation of this type of stove, is it necessary to have this pipe and damper extending from the stove to the flue?

A. Oh, yes; uh-huh.

Q. What is the purpose? Would you explain to the Court, please, how this damper works? Is it automatic or what?

A. By turning this thing here, you can adjust that where it will stand open; or screw it down there and it will likely stay closed, depending on the draft that you have up here in the flue. The heat rises, of course, and the cold air drops. If you are taking air for circulation back from the room, of course, when this is in operation, it makes it more economical and a better operation in general.

Q. Does that damper affect the amount of heat in the stove? [133]

A. Oh, yes. Oh, yes, it affects the distribution of the heat.

Q. Did you deliver or sell to the lumber company that day any of those pipe connections or any of those dampers?           A. No, sir.

Q. Now, did they ask for them?           A. No.

Q. What is the effect upon the heat in the room if that damper is not attached to the stovepipe?

A. Well, that would largely depend on the suction of your flue. If your suction—

Mr. Castro: Your Honor, we are going to object to this as irrelevant, incompetent, and immaterial, unless there is some showing as to the efficiency of



(Testimony of Sam Galbreath.)

a damper; so whatever they have relation to on this tee which he has in his hands, your Honor——

The Court: Overruled. Go ahead.

The Witness: You asked what effect it would have?

Q. (By Mr. Miller): Yes.

A. Well, if this was closed—or this wasn't on the pipe, your heat would go in the top part of your stove and it would go up into your pipe. It would come up and have a tendency to rise. If this was too large and you didn't have sufficient draft, the heat would have a tendency to be in the bottom of the stove and wouldn't raise enough [134] to give you sufficient heat. The purpose of this is a balance between the mixing of the air, see? Not the air through your stove, but to control the pull. The air enters at the bottom, of course.

Q. I see; and if that damper were not on the pipe, were not properly installed, would the pipe above the stove become hot?

A. Yes, depending on the strength of the flue. It would become extremely hot if the flue was very strong. It would go up maybe three or four joints, of extreme heat.

Q. In other words, it would depend upon the height of the flue and what draft was created from the outside air on the flue, is that right?

A. Yes, that's right.

Q. In the installation of the type of heater sold,

(Testimony of Sam Galbreath.)

it is necessary to have this valve on it, is that correct?      A. Yes.

Q. In order that the stove works properly?

A. Yes, sir; they should have them.

Mr. Miller: I would like at this time, your Honor, to introduce this pipe and damper as Defendants' Exhibit.

The Court: All right.

The Clerk: Defendants' Exhibit A.

(The pipe and damper referred to were received in evidence and marked Defendants' Exhibit A.) [135]

Q. (By Mr. Miller): Have you ever seen stove-pipes get red from the heat?      A. Oh, yes.

Q. Where did you see them get red, Mr. Galbreath?

A. Oh, many different places. The last occurrence was Grass Valley.

Q. On this same type of stove?

A. Yes; at Folsom or Grass Valley—Newcastle.

Q. That is due to overheating?

A. No, it's rectifying—by rectifying the draft from the room.

Q. That is taken care of by this valve, is it?

A. Yes.

Mr. Miller: That is all.

(Testimony of Sam Galbreath.)

Cross-Examination

By Mr. Castro:

Q. Does the stove have a damper with it when it is sold?

A. Some makes of them, and some haven't. Recently, they haven't been coming equipped with them. They had to stop this during the recent war.

Q. This was part of the standard equipment that was to go with the Customaire stove that you sold the Herold Lumber Company?

A. No, not that. If it had one of those, it's in the crate with the stove; but this is the particular type that is used. [136]

Q. Do you know whether or not there was one on the stove there at the Herold Lumber Company?

A. No, I don't know.

Q. (By the Court): You say there was none?

A. I don't know, sir.

Q. You don't know.

Mr. Castro: I move to strike the testimony as irrelevant, immaterial and incompetent as to that flue and damper.

Mr. Miller: If your Honor please, the testimony is that he had nothing to do with this. He sold no pipe to them.

Mr. Castro: He said it came in a box.

The Court: If it is there. He doesn't know whether one of those went with the stove.

The Witness: That's right.

(Testimony of Sam Galbreath.)

The Court: That is the way I understood the testimony.

The Witness: If there was one in the crate, I don't know.

Q. (By Mr. Miller): Let me ask this: Are these pipes and dampers customarily sold separately from the stove?

Mr. Castro: Objected to as incompetent, irrelevant and immaterial. They are supplyable by the suppliers.

The Court: Overruled.

Mr. Miller: Well, may I inquire as to the practice? [137]

Q. (By Mr. Miller): Is this a part of the purchase of the stove? A. No.

Q. It is separate entirely from the stove, is that correct?

A. Yes. If the stove comes equipped with one, naturally they don't need to make the additional purchase of that little air valve.

Q. (By the Court): Now, you said that you sold the stove and it was crated at the time you sold it? A. Yes, sir.

Q. And you don't know whether this damper was included in that? A. No, sir; I don't.

Q. (By Mr. Miller): You didn't sell any pipe?

A. No pipe.

Q. And you didn't install any pipe——

Mr. Miller: This is based on the testimony of Mr. Lemos.

The Court: The testimony goes out in reference to the damper.

Mr. Miller: That is all.

Mr. Castro: No questions.

Mr. Miller: That is all we have to offer, your Honor.

Mr. Castro: Call Mr. O'Malley. [138]

JOHN L. O'MALLEY

Called by the plaintiffs on rebuttal, sworn.

By the Clerk:

Q. What is your first name, Mr. O'Malley?

A. John L.

Q. Thank you.

Direct Examination

By Mr. Castro:

Q. Where do you reside, Mr. O'Malley?

A. San Francisco.

Q. How long have you lived there?

A. Six years. [139]

Q. And what is your occupation?

A. Investigator for Swett and Crawford Insurance Company.

Q. And where are they located?

A. 100 Sansome Street, San Francisco.

Q. Now, on or about the 27th day of October, 1947, were you employed as an insurance adjuster by Swett and Crawford? A. I was.

Q. And did you receive an assignment concerning this fire at the Harold Lumber Company?

(Testimony of John L. O'Malley.)

A. I did.

Q. And in response to that assignment, where did you go?

A. To the town of Auburn, California.

Q. And while there, did you meet a Mr. Harry Gregory?      A. I did.

Q. And he is the man that preceded you on the witness stand?      A. He is.

Q. And did you meet anybody else?

A. Mr. Sam Gailbreath was present.

Q. And did you have a conversation with these gentlemen?      A. I did.

Q. And in the course of that conversation, did you take notes?      A. I did.

Q. I show you Plaintiffs' Exhibit No. 4 for Identification. Were those your notes?

A. They are. [140]

Q. And at the conclusion of your conversation, did you read or show those notes to Mr. Gailbreath or Mr. Gregory?

A. I reread them to Mr. Harry Gregory and asked him for his signature.

Q. And was that in the presence of Mr. Gailbreath?      A. It was.

Q. And is that signature—do those notes bear the signature of Harry Gregory?      A. They do.

Q. Now, in that conversation, did you ask Harry Gregory or Sam Gailbreath who connected the stove involved?      A. I did.

(Testimony of John L. O'Malley.)

Q. And what was the answer?

A. Harry Gregory stated he had connected the stove.

Q. And did he say whether anybody had attempted to connect it before he made the connection?

A. He said it had been partially installed.

Q. Did he indicate who—pardon me, can I get that answer?

The Court: It had been partially installed.

Q. (By Mr. Castro): And did he state who had done that partial installation? A. He did not.

Q. Did you ask him what part of the installation he did? A. I did.

Q. What did he state? [141]

A. He said, "I set it up and put the tubing from the tank to the stove, and the tubing was underneath the flooring."

Q. Now did he tell you about how long he was there doing this job?

A. Two and a half to three hours.

Q. And did he tell you who lighted to stove?

A. Harry Gregory said he had lighted the stove.

Q. Did he tell you that a Cerino Lemos had lighted the stove? A. He did not.

Q. Did he tell you that he used—did anything with the flashlight in the process of lighting that stove?

A. He did. He says that after he turned on the valve, he watched the flow of oil into the part of

(Testimony of John L. O'Malley.)

the stove and when he had left it on for a couple of seconds, when the oil was seen to flow with the flashlight, that he then threw in a lighted match.

Q. Did you ask him about the condition of the painting, whether he saw anybody painting in the office?

A. He said he did not see anybody painting.

Q. Did he state whether or not he smelled any fresh paint in the office?

A. I asked him and he said he did.

Q. Did he tell you whether there was any employee on the Gailbreath premises during that two and a half to three hours other than himself? [142]

A. I asked him and he said he was the only one.

Mr. Castro: You may cross-examine.

#### Cross-Examination

By Mr. Miller:

Q. Calling your attention to the two attached papers you have in your possession here, whose signature is that at the top (Spelling) H-a-r-r-y G-r-e-g-o-r-y? A. Yes, sir.

Q. You wrote that? A. Yes.

Q. All right. You don't pretend that that is the signature of Harry Gregory?

Mr. Castro: Neither do I.

Mr. Miller: Now, please, counsel.

Q. Now, let's go to the back of that. Do you know—— A. Yes, sir.



(Testimony of John L. O'Malley.)

Q. (Continuing): —who wrote that?

A. I did.

Q. You wrote that, didn't you? A. I did.

Q. Let me ask you this: Is the name of Harry Gregory written in the handwriting of Harry Gregory apparent anywhere on that page?

A. No, sir.

Q. How long have you been in the business of going out and making investigations regarding insurance losses? [143]

A. Three and a half years.

Q. Three and a half years; and you were there for the purpose of having an interview with Mr. Gregory, to see what he knew about this fire; is that correct? A. Among other reasons.

Q. As a part of your regular employment, is that right? A. Yes, sir.

Q. And at that time, why, you were making that investigation with the expectation that any statements you received at that time might later be used in a trial of litigation, isn't that right?

A. Actually, I didn't want to record anything but the statement from him describing his actions on that day.

Q. Well, that isn't quite an answer, but maybe we can get at it this way, Mr. O'Malley: In your three and a half years, you have made for your employers many investigations, isn't that true—true of fire losses? A. Many—not many.

(Testimony of John L. O'Malley.)

Q. You have made several, haven't you?

A. Yes, sir.

Q. And why did you have him sign this second page here of this document?

A. I generally always do when I record the statement of a person, and ask them after I read it if he wants to sign it. [144]

Q. Yes. Why did you have him sign the second page? Will you give us the reason for it?

A. Because they were his words and I wanted to record them.

Q. They were his words? A. Yes, sir.

Q. And you wanted him, by signing it, to affirm those words and adopt them as his language; that is, your written words, is that right?

A. They happen to be—those written words are his language.

Q. All right. What I assume is this: That you had written down his language— A. I did.

Q. (Continuing) —on the sheet of paper; you had him sign; and then you wanted him to make that more formal by adopting it?

A. That is correct.

Q. All right; and did you do that on instruction from Swett & Crawford, your employers?

A. No, sir; on the instructions of the attorney presenting this case.

Q. Who was that?

A. An associate of Mr. Castro's.

(Testimony of John L. O'Malley.)

Q. He told you to go and get the statement, is that it?      A. He did.

Q. All right; and he told you to have him sign it and adopt [145] it, is that it?

A. Well, it is usual. I don't know if he specifically asked me to secure the signature of any man on that statement. He did tell me to get a written statement from them if I could.

Q. All right. Now, why didn't you have him sign that first page?

A. So that it would be more authoritative.

Q. Why didn't you have him sign the first page?

A. To be truthful, the statement was taken on the outside of the house and the man was pressed because he had to hurry into the house for dinner, and that's why I didn't take a more formal statement on the typewriter in probably an office that I might have acquired in the town of Auburn. It was near the dinner hour and I purposely avoided having a more formal statement.

Q. By typing, is that what you mean?

A. That's right.

Q. Here is what I am getting at. You took the trip and the trouble to have him sign this one page; in fact, all the second page, or the first page of this document as you testified to, but why didn't you ask him to sign the other page?

A. I didn't think he would have any objection, so I didn't take the trouble to have him sign each page.

(Testimony of John L. O'Malley.)

Q. Yes. When did you put the name on there in pencil, [146] "Harry Gregory"?

A. Well, probably about two or three weeks later when I asked the stenographer in our office to transcribe those notes from handwriting to typewriting so that they might be more legible.

Q. At no time did you show this to Harry Gregory and ask him to try to read it, did you?

A. I believe I did, in this respect: that he actually witnessed my writing over my right shoulder and I copied down what he was telling me simultaneously so that he might have an opportunity to see what my writing was; although, granted, it is quite illegible.

Q. You grant that this writing is quite illegible, don't you?           A. Yes.

Q. Now you didn't see Mr. Gregory here sit down and read this over and take a look and make any changes, did you?

A. No, as I said to you, I read it for him.

Q. You read it for him, is that right?

A. With him looking over my shoulder. I knew he knew the contents of it.

Mr. Castro: It hasn't been offered in evidence, your Honor. It was only used by this witness for the purpose of refreshing his own recollection.

The Court: Go ahead. [147]

Q. (By Mr. Miller): All right. Now, let's get the position. What were you writing on?

(Testimony of John L. O'Malley.)

A. I believe it was a carpentry table that was on the front lawn of his residence.

Q. A table on the front lawn of his residence; and you were standing up while you were writing, is that it?

A. It was an elevated table, and it seems to me I was standing up.

Q. You were standing up; is that it?

A. Yes, sir.

Q. And I assume you are right-handed? You write with your right arm? A. Yes, sir.

Q. And you were making these notes as he was talking, is that it? A. That's right.

Q. And you leaned over on this table which would be just like the one next to the court reporter, or just a little higher?

A. The structure right now is not clear to me, but it appeared to me a carpentry table a little more elevated than that one, and one commonly used in the construction of buildings.

Q. Well, it would be somewhat higher than this?

A. Elbow height, I think.

Q. How tall are you? [148]

A. Six, four.

Q. You are six, four; and this table would be about elbow height to you, wouldn't it, standing up?

A. Probably; yes, about that high; a little bit higher than the average table.

Q. And you were writing on that paper—these two papers, is that your contention?

(Testimony of John L. O'Malley.)

A. Yes, sir.

Q. Did you look around and see what Gregory was doing? Was he standing back of you?

A. He was right beside me looking over my right shoulder.

Q. He was looking right over your shoulder? You remember that vividly, is that it?

A. I will put it this way: He was periodically looking over my shoulder. He didn't continually remain at my shoulder.

Q. Was he walking around about the yard there as you were talking to him?

A. He may have in between. I discussed at length this fire and the cause, and he may have been walking around at different times during the course of this statement.

Q. Yes; he was walking around during this period?

A. Not during all of it.

Q. And you think that he may have had an opportunity to read some of your handwriting which you described as not very legible? [149]

A. If he didn't, I read it for him.

Q. Well, if he didn't see it, then you reread what you have written down here, is that it?

A. Actually, I have no way of knowing whether he read those notes, if that's your question; but he was peering over my shoulder in an endeavor to read them.

Q. Well, periodically as you described?

(Testimony of John L. O'Malley.)

A. Periodically, yes, sir.

Q. All right. Now after you wrote this—do we understand that you wrote this first page that is written on both sides here?

A. I wrote all that writing.

Q. Well the first page, what is that written? First the one that is written on both sides? Or the page that is just written on one side?

A. I don't know. I will have to look at it.

Q. All right.

A. I first asked him to describe the stove. So undoubtedly this is the first page where he describes the stove.

Q. You what ?

A. First asked him to describe the stove; so this would be the first page.

Q. All right. Then the first page was the page that was written on both sides, is that correct?

A. That's right. [150]

Q. And after you finished that page, then you went to the second page, didn't you?

A. Presumably.

Q. Now "Presumably"—is that correct, you did, didn't you, Mr. O'Malley? You wrote the double-sided page first then you went on to the second page?

A. It appears now as if I did, but, as a matter of fact, I don't know.

Q. You don't recall then, do you——

A. No, I don't.

(Testimony of John L. O'Malley.)

Q. (Continuing): —whether you wrote the page with the writing on one side first, or the page with the writing on both sides, first?

A. No, I don't know. It seems to me I finished one side and then withdrew the second piece of paper and completed the statement.

Q. All right. Now, while you were writing one of these sheets, the second, you didn't turn around and hand the first one to Mr. Gregory and say "Look it over" did you? A. No, sir.

Q. Did you write down all the conversation and all the facts that were given about this fire?

A. All that were pertinent.

Q. Yes; and by the way, you want to tell his Honor at this time that you wrote down all the pertinent facts? [151]

A. Yes, sir.

Q. (Continuing): —that were given to you by Gregory, is that right? A. Yes, sir.

Q. Did Mr. Galbreath join in any of this conversation between you and Mr. Gregory?

A. Yes, sir.

Q. Once in a while, he injected himself into the conversation, didn't he? A. Yes, sir.

Q. Did you write down anything Galbreath said?

A. No, I don't think I did at that time.

Q. All right. Now here, do you wish to tell his Honor, or tell me that at that time, the name of Mr. Lemos, this young fellow who testified he was an employee working there at that time and was at the



(Testimony of John L. O'Malley.)

lumber company on that day, was not mentioned by Mr. Gregory?

A. I certainly want to tell you that.

Q. At no time was he mentioned as an employee or as having anything to do with that stove or the delivery? A. Absolutely.

Mr. Castro: We will stipulate he had no knowledge concerning his identity until today, counsel.

Mr. Miller: Mr. Little, your witness, testified he was there. [152]

Mr. Castro: He didn't know who he was.

Q. (By Mr. Miller): By the way, you are naturally interested on behalf of Messrs. Swett and Crawford, your employers, in the outcome of the case here, aren't you?

A. Not particularly.

Q. Well, you would like to see the plaintiff here with this case, wouldn't you? A. No, sir.

Mr. Miller: That is all.

#### Redirect Examination

By Mr. Castro:

Q. You are paid regardless of the outcome of this case, aren't you? A. That's right.

Q. You are on a monthly salary with Swett and Crawford? A. Yes, sir.

Mr. Castro: No further questions. Oh, yes, I have one further question:

Q. Did you have any conversation with him concerning the size of that storage tank outside of the building? A. Yes, I did.

(Testimony of John L. O'Malley.)

Q. And what was the conversation?

A. It seems to me I was told that it was a 100-gallon tank.

Q. And did you have any statement as to how much oil had come out of the tank at the time it caught on fire?      A. No, I didn't. [153]

Mr. Castro: No further questions.

Would you take the stand, Mr. Charley Little?

The Clerk: Charley Little will be recalled. Just take the stand, sir.

### CHARLES W. LITTLE

recalled by the Plaintiffs on Rebuttal, previously sworn.

#### Direct Examination

By Mr. Castro:

Q. How many employees did you have at the Herold Lumber Company on the day of the fire?

A. Four.

Q. And who were they?

A. Roy Albers, James France I believe his name is, and Glen Carns and myself.

Q. Now Glen Carns is now dead?

A. That's right.

Q. What was his work there?

A. Sales end, helping the bookkeeper with the pricing.

Q. Did he at any time help to install that stove?

A. No, sir.

Q. Other than move the stove from Galbreath's

(Testimony of Charles W. Little.)

to your place of business and uncrate the top of it, did Roy Albers do anything in the installation of that stove?

A. I have no knowledge of that.

Q. Did you see him do anything toward the installation?

A. No, I have no knowledge.

Q. Did you see Jim France do anything in the installation of [154] the stove?

A. No.

Q. Now, did you furnish any chimney pipe or stovepipe for the connection between the stove and the flue?

A. No.

Mr. Castro: You may cross-examine.

#### Cross-Examination

By Mr. Desmond:

Q. You testified this morning, Mr. Little, that you didn't know who installed the stove?

A. That is correct.

Mr. Desmond: That is all.

#### Redirect Examination

Q. Did you instruct any of your men to install it?

A. Absolutely not.

Q. Was the man who came to your place of business, with the tubing and the other fittings, Mr. Lemos who is sitting back here?

A. Well, it appears to be the man, but that I couldn't identify this morning. I described him to you once as dark, and a new man to me that I didn't know.

Q. Did you give him any instructions to take

(Testimony of Charles W. Little.)

any of your men over and help him install that stove?

Mr. Miller: Just a moment, I object to that as being improper questioning, assuming something not in evidence. [155] He said "to install the stove."

The Court: Overruled.

Q. (By Mr. Castro): What was your answer?

A. No, sir.

Q. Were you present when Harry Gregory came to your plant?

A. I was. He might have been present, but I didn't see him.

Q. Do you have any definite recollection about when Gregory arrived? A. No, sir.

Q. Did he come up and discuss the stove with you? A. No, sir.

Q. Or ask you any instructions concerning the installation? A. No.

Mr. Castro: You may cross-examine.

#### Recross-Examination

By Mr. Desmond:

Q. You testified this morning, Mr. Little, didn't you? You testified on the stand here this morning?

A. I did.

Q. Do you remember giving testimony that you don't know who installed that stove?

A. That is correct.

Q. You also gave testimony that you don't know

(Testimony of Charles W. Little.)

who put up the stovepipe leading from the stove to the flue? [156]           A. Correct.

Q. And you also testified that you didn't remember whether there was any stovepipe came with the stove because you had some in the plant?

A. My recollection is that we had no stovepipe in the plant. My recollection is that all the fittings necessary to install the stove would be brought over from Mr. Galbreath's.

Q. And were you charged with any of the stovepipe?

A. We were not charged with any stovepipe.

Q. Didn't you testify this morning that you thought you had some at the plant?

A. No, I didn't testify to that. I thought I said if there was any, it might have been used; but I can say that there wasn't any because we had nothing of the kind out there. It was an entirely new outfit. There had been no stove anywhere around there and no reason to have any pipe there.

Q. The testimony this morning was——

Mr. Castro: Let's have the testimony read back there counsel. I prefer it to counsel's notes.

The Court: Oh, I don't want to delay it. Proceed. You might ask him if he didn't testify so and so.

Q. (By Mr. Desmond): Didn't you testify this morning that you didn't remember whether there was pipe at your plant or whether you bought the pipe from Mr. Galbreath?

(Testimony of Charles W. Little.)

Mr. Castro: It has been asked and answered.

The Court: Overruled.

The Witness: As far as the purchasing of any stovepipe, there was no stovepipe purchased anywhere in our records; unless it came from Galbreath's, I don't know where it came from.

Q. (By Mr. Desmond): Oh——

A. It may have been an oversight on their part of charging it.

The Court: Anything further?

Mr. Desmond: Are you through, counsel?

Mr. Castro: Have you completed your cross-examination?

Mr. Desmond: I am through, yes.

Mr. Castro: That is all with this witness.

The Court: All right. Any further rebuttal?

Mr. Castro: The only other rebuttal witness I have would be a man, expert, with Sherwin-Williams, as to the question of inflammability of the Standard Floor Hardener, and that's the last evidence I have. If the Court feels it can make its decision without that evidence, I have no reason to proceed.

The Court: I don't care to commit myself one way or the other. You have got all your evidence in, and it is time to ask the commitments.

Mr. Castro: We will submit the matter on the record. [158]

Mr. Desmond: I would like to call Mr. Galbreath once more, your Honor.

SAM GALBREATH

recalled by the defendants on Surrebuttal. Previously sworn.

Direct Examination

By Mr. Desmond:

Q. Were you present, Mr. Galbreath, when Mr. O'Malley and Harry Gregory had this conversation at which Mr. O'Malley took notes?

A. Yes, I took him there.

Q. You took Mr. O'Malley to Gregory's residence? A. Uh-huh.

Q. Did Mr. O'Malley read the contents of those papers to Mr. Gregory? A. No.

Q. Did you have any discussion concerning it?

A. Well, we had a conversation as to the questions he was asking him, but he didn't read that paper back to him.

Mr. Desmond: That is all.

Q. (By The Court): Did you see him sign it?

A. Yes, the man signed it, just the one sheet.

Q. Just signed the one sheet, is that right?

A. I can't answer on that, but that's all I saw.

Mr. Desmond: That is all.

Cross-Examination

By Mr. Castro:

Q. Do you have any recollection as to what [159] was stated at that time and place by Mr. Gregory?

A. No, I can't recall the conversation.

Mr. Castro: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Anything further?

Mr. Desmond: I have nothing further, Judge.

The Court: Well, gentlemen, I haven't any time to give you for argument in this matter. Why can't both of you write me a letter setting forth your views on it?

Mr. Castro: Either that, or else submit it on the record as it stands, your Honor.

The Court: Whatever you want.

Mr. Castro: Whatever your Honor wants to do. I will write the letter if that is what you wish, or what counsel wishes to do.

The Court: Oh, you write a letter within the next three or four days; and within the same length of time, the respondent will.

Mr. Desmond: That's right, your Honor, the plaintiff will write the letter and——

The Court: Yes, and after that, you have five days in which to reply.

Mr. Desmond: All right.

The Court: We will now adjourn. [160]

(The court was then adjourned.)



Certificate of Reporter

I, C. E. Moneyhun, Official Reporter Pro Tem, certify that the foregoing 160 pages are a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing to the best of my ability.

/s/ C. E. MONEYHUN.

[Endorsed]: Filed Jan. 11, 1950.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendant.

Complaint.

Answer to complaint.

Amendment to complaint.

Findings of fact & conclusions of law.

Judgment.

Notice of appeal.

Designation of portions of record, proceedings

and evidence to be contained in the record on appeal, together with statement of points on appeal.

Order extending time to prepare record on appeal.

Reporters Transcript.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court this 12th day of January, 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ C. C. EVENSON,  
Deputy Clerk.

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[Endorsed]: No. 12452. United States Court of Appeals for the Ninth Circuit. Sam Gailbreath, Appellant, vs. The Homestead Fire Insurance Company and Sun Insurance Office, Limited, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed January 13, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD ON APPEAL

To Paul P. O'Brien, Clerk of the United States  
Court of Appeals for the Ninth Circuit:

You will please take notice that Appellant Sam Galbreath does file the hereinafter statement of points on appeal:

1. Insufficiency of the evidence to justify the decision and verdict of the District Court of the United States, for the Northern District of California, Northern Division.

2. That the decision and verdict of the District Court of the United States is against the law.

3. A stove is not an inherently dangerous article and the "Res Ipsa Loquitur" doctrine is not applicable.

4. The court committed error in finding that the fire was proximately caused by the stove.

5. The instrumentality complained of (the stove and its accessories) were not under the exclusive control of the defendants.

6. As a general rule, the destruction of property by fire does not raise the presumption of negligence.

Statement and Designation of Record  
Material to the Appeal

1. A transcription of all of the testimony reported at the trial in the District Court of the United States.

2. The Complaint, Amended Complaint, Answer, Findings of Fact and Conclusions of Law, Notice of Motion for New Trial, Decision, Judgment and Opinion of the District Court of the United States.

Respectfully submitted,

EARL D. DESMOND,

E. VAYNE MILLER,

K. D. ROBINSON,

Attorneys for Defendant and  
Appellant Sam Galbreath.

[Endorsed]: Filed March 6, 1950.